

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

813

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,574

**MORRIS JOHNSON
DOROTHY JOHNSON**

Appellants

v.

**AMERICAN FEDERATION OF MUSICIANS
MUSICIANS PROTECTIVE ASSOCIATION, LOCAL #710
MUSICIANS UNION - DISTRICT OF COLUMBIA FEDERATION
LOCAL #161**

Appellees

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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*United States Court of Appeals
For the
District of Columbia*

NOV 23 1956

Joseph W. Stewart
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(i)

No. 13, 574

**STATEMENT OF
QUESTIONS PRESENTED**

Where the defendant, American Federation of Musicians, maintains a blacklist known as the "National Defaulters List" wherein the names of the establishment where federation members had performed and the names of such operators who have defaulted in the payment of their wages are placed on the Defaulters List; and where the Federation through its affiliates enforces the blacklist through the use of a boycott by not permitting its federation members to perform or patronize in such establishments or blacklisted operators; and where the federation and its affiliates have established a policy of holding the establishment or new prospective club operators liable for such previous non-payment of wages and require them to pay money to the federation in order to operate with Federation members; and where the owners of the property who had never employed Federation members are also held liable for the debt of the establishment; and where new prospective operators refuse to negotiate a lease for the use of such establishment because of the Federation's blacklist and its collection methods, the fundamental questions presented on this appeal are:

1. Whether an unincorporated labor organization is engaged in a legitimate union activity under federal law, when it maintains, circulates and enforces a blacklist among its members and others for the purpose of requiring innocent persons to underwrite debts of others so that Federation members are allowed to perform in the blacklisted establishment?
2. Whether plaintiffs have been denied a fair trial by an impartial jury where there has been undue interference by the trial Court and misconduct of opposing counsel?

(ii)

3. Whether the Court erred in granting the defendants' motion to require the plaintiffs to produce joint federal and District of Columbia income tax returns?

4. Whether the Court erred in granting the defendants' motion to amend its answer to add affirmative defenses of statute of limitations and laches although the cause had been pre-tried, a trial date had been set and a period of more than 16 months had elapsed since the cause was calendared?

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LOCAL #161

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Morris Johnson and Dorothy Johnson filed a complaint against the American Federation of Musicians, the Musicians Protective Association, Local #710, and the Musicians Union - District of Columbia Federation - Local #161 in the United States District Court for the District of Columbia and asserting that the defendants, acting in concert, unlawfully interfered with their rights to make certain leases for rental of realty owned by them; that said defendants had imposed an unlawful boycott against plaintiff's realty by means of a conspiracy in violation of anti-trust laws; and that said defendants had libeled plaintiff's by listing

their property known as the Club Bengazi on the Federation's National Defaulters List thereby disparaging plaintiff's property and their reputation.

Each defendant duly answered the three count complaint with a general denial and later, with leave of Court, filed an amended answer asserting the affirmative defenses of Statute of Limitations and Laches.

A jury was sworn to try the issues in this cause and each defendant made an oral motion for a directed verdict at the conclusion of plaintiff's case. United States District Judge, Burnita Shelton Matthews, granted the motion and instructed the jury to return a verdict for each defendant on all issues in this cause. From this verdict plaintiffs have taken this appeal.

Jurisdiction over this appeal is vested in this Honorable Court by virtue of the United States Code, Title 23, Secs. 1291 and 1292.

STATEMENT OF CASE

The appellants, husband and wife, owners of the premises and improvements known as 1423-1425 "U" Street, N. W., Washington, D. C., formed a private unincorporated club in the lower portion of said premises, later known as the "Club Bengasi", which is the focal point of this law suit. Prior to filing suit the appellants had not operated the "Club Bengasi" nor had they ever hired Federation Musicians, but had leased the premises to a number of lessee-night club operators who employed Federation Musicians.

The first of these lessee-operators was Lloyd Von Blaine who in 1943 operated and leased the Club Bengasi for a period of several years paying rents to the appellants of \$8400 annually. (Exhibit 2 A-B) As recent as the summer of 1954 Lorenzo Middleton offered to lease the club for \$7200 per year. In 1946 the club and its good will were sold for \$30,000. (Exhibit 2B)

The appellees in this cause are the American Federation of Musicians, and its District of Columbia affiliates, namely Local #710 and Local #161. The Federation maintains a National Defaulter's List in its monthly publication the "International Musician". (Exhibit 17) This journal is circulated to all members of the Federation in accordance with its by-laws throughout the United States and Canada and to approximately 500 non-union members. The Federation's by-laws provide that any organization, establishment or person defaulting in obligations to union members may be placed on the defaulter's list; that Federation members are not permitted to render services for such establishment or person subject to penalties of expulsion and/or fine; and that such person or organization having other establishments in other localities may also be placed on the defaulters list. No provision is made therein for removal of any name from the list. However, it is the announced policy of the Federation to impose liability against an establishment even though a new operator may take over after the original default; and that the new operator or owner must arrange to satisfy the pre-existing indebtedness for clearance. (Exhibit 16)

One lessee-operator, Paul Mann failed to pay the wages of certain Federation Members who performed at the Club resulting in the "Black-listing" of the "Club Bengasi" in October 1948 by the appellees. The Club Bengasi remained on the "Black List" from this time until date of trial except for a relatively short period of time.

During all this time Plaintiffs have endeavored to lease the "Club Bengasi" to various operators, but in most instances were unsuccessful because the Federation, through its local and national officers and members, would openly hinder and interfere with such negotiations by informing prospective lessees of the "black listing" of the Club and of the Federation policy and by-laws with respect thereto. (J.A. 65) In addition the Federation in carrying out its policy further interfered by demanding that the obligations of the prior operators of The Club be

satisfied first before Federation Members could perform there and by preventing its members from patronizing and performing in the "Club Bengasi". As a result, for the most part, the "Club Bengasi" has remained vacant from October 1948 until filing of the suit and the fixtures therein have been rendered obsolete and the Good Will of the "Club Bengasi" had been completely dissipated, and the appellants have sustained loss of rental income.

In no instance was any effort made by the appellees to have a credit report made on the prospective lessee-operator before prohibiting the Musicians from playing at the "Club Bengasi". (J. A. 56) Not only did the appellees seek to collect Paul Mann's debts from prospective lessees but they were actually successful in collecting approximately \$1500 from Louis Murray who operated the Club for about 2 years while making installment payments on the indebtedness of another. (JA 86) During Murray's operation of the Club he was able to obtain the services of Federation Members commencing in 1951 by complying with the policy and by-laws mentioned above in making installment payments on Paul Mann's debts. During this time Louis Murray was personally black listed as a result of prior activity not connected with the "Club Bengasi". (J. A. 86-7)

The Federation even attempted to collect Paul Mann's debt from the appellants and the legal remedies to collect from Paul Mann have never been pursued. This is demonstrated by Plaintiff's exhibit No. 16 which states as follows:

Mr. Morris Johnson
1603 Mass. Ave., N. W.
Washington 5, D. C.

November 12, 1954

Dear Sir:

This will acknowledge yours of November 10th wherein you state you are interested in operating the Club Bengazi which is on the National Defaulters List of this organization.

There have been a number of operators of this club from time to time; however, in line with the policy of the A. F. M. an establishment is liable for indebtednesses to our members regardless of the fact that a new operator may take over after the original default. In order for the establishment to be removed from the Defaulters List arrangements have to be made for payment of such indebtedness.

Our records show the following claims standing against this Club.

\$	375.00	due	Erroll Garner
	2365.11	due	Charles Brown
	394.14	due	Nat Nazarro
	40.00	due	John Kirby
	136.00	due	Carl Drinkard
	250.00	due	Oscar Peterson

\$ 3560.25

If you are interested in clearing up this account, further information will be furnished on these cases. Also, advise the amount you can pay down and pay each month.

Very truly yours,
/s/ Leo Cluesmann
Secretary of A. F. of M.

Numerous requests were made to Federation officials by the appellants to have the Club Bengasi removed from the Defaulter's List. In each case the Federation stated that payment of money was prerequisite to removal from the Defaulter's List. Potential lessee-operators, namely Ralph Feldman, (J.A. 61), Dr. James Cowan, (J.A. 86-89) and Lorenzo Middleton (Exhibit 14) failed to execute their leases with appellants when they were informed of the Federation's Blacklist. In fact, prospective lessee-operators will not lease the "Club Bengasi" unless they can obtain popular entertainers from among the American Federation of Musicians, because they believe from the prior operation of the "Club Bengasi" that they could not otherwise be successful. (J.A. 79)

Specific facts admitted by the Defendants are enumerated in the Answer of the Defendants as follows:

1. Defendant American Federation of Musicians is an unincorporated labor organization with thousands of individual members and hundreds of

local affiliates throughout the United States which are governed by a national constitution and by-laws. (J.A. 12)

2. Defendants local #710 and local #161 are unincorporated labor organizations maintaining offices and doing business within the District of Columbia. (J.A. 12)

3. Defendants are primarily composed of especially talented members who are adept at performing with all types of musical instruments. (J.A. 12)

4. Defendant American Federation of Musicians maintains a National Defaulter's List in its monthly publication entitled "International Musician", listing establishments that have defaulted in their contractual obligations with members of the federation. (J.A. 13)

5. That when an establishment is placed on the National Defaulter's List no member is permitted to contract for or perform in that establishment until it is removed from said list. (J.A. 13)

6. Club Bengasi was, at the time of answering complaint, on the National Defaulters list. (J.A. 14)

7. Paul Mann and Ralph Feldman former lessees of the "Club Bengasi" defaulted on their contracts with members of the American Federation of Musicians and that Club Bengasi was placed, for certain periods of time on the National Defaulters list because of such defaults. (J.A. 14)

8. That individual members of the American Federation of Musicians did supply musical entertainment to Louis Murray operating as the "Club Bengasi", upon his promise to make monthly payments on past indebtedness incurred by the "Club Bengasi". (J.A. 15)

9. A.F.M. admits that it is the publisher of a monthly journal called the "International Musician" which is circulated and read by its members, their families and friends throughout the United States and Canada. (J.A. 16)

STATUTES INVOLVED

1. The Norris-Laguardia Anti-Injunction Act reported in the United States Code Title 29 states in part as follows:

Sec. 101. ISSUANCE OF RESTRAINING ORDERS AND INJUNCTIONS; LIMITATION; PUBLIC POLICY. No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. Mar. 23, 1932, c. 90, Sec. 1, 47 Stat. 70.

Sec. 113. DEFINITIONS OF TERMS AND WORDS USED IN CHAPTER. When used in this chapter, and for the purposes of this chapter:

- a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (i) between one or more employers or associations of employers and one or more employees or associations of employees; (ii) between one or more employers or associations of employers and one or more employers or associations of employers; or (iii) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).
- b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.
- c) The term labor dispute includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.
- d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or

limited by Act of Congress, including the courts of the District of Columbia. Mar 23, 1932, c. 90, Sec. 13, 47 Stat. 73.

2. The Sherman Anti-Trust Act reported in the United States Code, Title 15 states in part as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal:
* * * * *

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor,
* * * * *

Sec. 3. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations is declared illegal. * * * * *

Sec. 12. WORDS DEFINED. "Antitrust laws" as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title.

"Commerce", as used in sections 12, 13, 14-21, and 22-27 of this title, means trade or commerce among the several states and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, and between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in the aforesaid sections contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in sections 12, 13, 14-21, and 22-27 of this title, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sec. 15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

Sec. 17. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

3. Interference with commerce by threats or violence, reported in the United States Code, Title 18, states in part as follows:

Sec. 1951. a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined * * * *. b) As used in this section — (i) The term robbery means the unlawful taking or obtaining of personal property from the person * * *, against his will, by means of actual or threatened force, or violence, or fear of injury, * * * to * * * property in his custody or possession * * * *. (ii) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right. (iii) The term "commerce" means commerce within the District of Columbia, * * * *.

4. Publicity of returns and lists of taxpayers, reported in the United States Code, Title 26, states in part as follows:

Sec. 6103 (a) Public record and inspection — (i) Returns made with respect to taxes imposed by chapters 1, 23, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President. (formerly Sec. 55.)

5. Taxation and fiscal affairs, reported in the District of Columbia Code, 1951 edition, Title 47, states in part as follows:

Sec. 1412. **COLLECTION OF PERSONAL PROPERTY TAXES - SECRECY OF RETURNS.** Except in accordance with proper judicial order and as otherwise provided by law, it shall be unlawful for the Commissioners of the District of Columbia or any persons having an administrative duty under this title to divulge or make known in any manner any information contained in any return required under this chapter. The persons charged with the custody of such returns shall not be required to produce any of them in any action or proceeding in any court except on behalf of the United States or the District of Columbia or on behalf of any party to any action or proceeding under the provisions of this chapter, when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of and may admit in evidence so much of such returns or the facts shown thereby as are pertinent to the action or proceeding, and no more. * * * * *

Sec. 1564c (a) **SECRECY OF RETURNS.** Except to any official of the District, having a right thereto in his official capacity, it shall be unlawful for any officer or employee of the District to divulge or make known in any manner the amount of income or any particulars relating thereto or the computation thereof set forth or disclosed in any return required to be filed under Sec. 47-1564, and neither the original nor a copy of any such return desired for use in litigation in court shall be furnished where neither the District nor the United States is interested in the result of such litigation, whether or not the request is contained in an order of the court: Provided however, That nothing herein contained, shall be construed to prevent the furnishing to a taxpayer of a copy of his return upon the payment of a fee of \$2.00.

SUMMARY OF ARGUMENT

The appellees acted without authority of law when they blacklisted a parcel of real estate for failure to pay debts due to Federation members when incurred by a night club operator located on the realty; when they imposed a secondary boycott against a parcel of realty which was not the subject of a labor dispute and for the sole purpose of extorting money from an innocent party by compelling that debts of another be underwritten; when Federation members were prohibited from patronizing entertainment or participating therein on the blacklisted realty;

when they circulated information concerning the blacklisted status of the said parcel of realty to prospective lessees of appellants and other non-federation members; when they acted as collection agent on a breach of contract between Federation members and club operators and who sought collection from innocent victims.

The activities of the Federation were unlawful not only because any individual would be liable for damages, but because the appellee who occupied a special favored position as a labor organization, and its conduct and aims were not founded upon genuine issues involving a bona fide labor controversy or dispute; wherefor, such activities are enjoinable pursuant to the Norris Laguardia Act and constituting a violation of the Sherman anti-trust Act Secs. 3 and 15. In addition, since prospective lessees believed that the success of business conducted on appellants realty depended upon the availability of Federation musicians and because of the blacklist, which had been brought to their attention by appellees, such musicians would not be available to them, said prospective lessees would refuse to deal with appellant whereby the parcel of realty could not be leased or sold. This conduct disparaged property of appellants constituting a slander of title according to well established law.

The remaining points by themselves do not warrant reversal of the judgment of the District Court, therefore, they are presented in summary form in the argument itself.

ARGUMENT

I.

The American Federation Of Musicians Is Not Engaged In A Legitimate Labor Union Activity When It Acts As A Collection Agency Which Is Made Effective Through The Use Of A Blacklist Against The Property Of An Innocent Party.

The appellants have proved that the defendant-appellee unions have acted unlawfully in the following respects:

a) The Federation has no lawful right to list a parcel of real estate in its blacklist as being in default of a contractual obligation to pay wages. The Club Bengazi is a part of a parcel of realty which is not incorporated, not doing business, has no legal capacity to make a contract and cannot sue or be sued, because it is not a legal entity.

b) The Federation has no lawful right to establish and maintain a policy of imposing pecuniary liability by holding an establishment, such as the Club Bengazi, liable for the contractual obligations of its manager or operator. The law provides a remedy by allowing suit, in personam, against the operator, but the law does not provide a remedy against the place or the forum where the contract was to be performed.

c) The Federation has no lawful right to prohibit its members, under penalty of suspension, from performing in the Club Bengazi and thereby imposing a secondary boycott against an establishment that is not involved in a labor dispute. The illegality of such boycott is compounded when it is used for the purpose of unlawfully extorting and coercing either the owner of the property or his new prospective lessee to pay off a debt not owed by them.

d) The Federation has no lawful right to prohibit its members, under penalty of fine, from patronizing the Club Bengazi, as being not

only an illegal extension of its unlawful boycott, but also an unwarranted infringement upon the individual Federation member's constitutional right to freedom of assembly.

e) The Federation has no lawful right to disseminate through its affiliates and members, either orally or in writing, any information concerning its blacklisting activities to non-Federation members for the purpose of publicizing its secondary boycott or to collect money from an interested innocent party.

f) The Federation has no lawful right to undertake to operate as a collection agency under the guise that it is a legitimate labor union activity and to enforce its collections through extortion by economic attrition of the victim's business and profit.

g) The Federation has no lawful right to require, as a condition of removing the Club Bengazi from the blacklist, the owner or successive lessee to pay debts contracted by an absconding predecessor lessee. No person, corporation or entity, muchless an unincorporated organization, has the legal right to dictate to a property owner or its tenant that an indebtedness of an individual shall run with and remain as a lien against the property until paid. If the Federation has no right to obtain a judgment in law against the owner or successive lessee, then the Federation has no right to demand payment of such indebtedness against these parties.

h) Negative factual circumstances tending to corroborate the unlawful activities of the Federation are as follows:

I. The individuals who had incurred indebtednesses while operating the Club Bengazi have never been sued.

II. The National Defaulter's List had not been used as a source for credit information available for use by its members.

III. The National Defaulter's List had not been used exclusively for the purpose of listing individuals actually indebted to Federation members.

IV. The National Defaulter's List had not been exclusively circulated among Federation members.

V. Money collected by the Federation had not been disbursed in full to the Federation member entitled to such sum.

VI. The Federation failed to remove the Club Bengazi from its black list even though requested by plaintiff who had represented to the Federation that a new financially able party was willing to operate the Club Bengazi.

VII. The Federation did not investigate the credit rating of a new operator for the Club Bengazi. On the contrary, they permitted Louis Murray to operate the Bengazi with Federation musicians after he made payment on the old indebtedness even though Louis Murray was personally listed on the Federation's blacklist.

The test to be applied to the activities enumerated above in order to determine the lawfulness of the Federation's position as an unincorporated labor organization acting in the interest of its employees has been enunciated by this Court in **BAKERY SALES DRIVERS LOCAL UNION #33, et al v. WAGSHAL**, decided April 28, 1947; 82 US App DC 138, 161 F.2d 380; affirmed 333 US 437, 68 S Ct 630. Judge Miller, in an opinion for a unanimous Court, stated that:

"The protection of labor in its broad programs of organization, and its specific efforts to advance the individual and collective well being of its membership does not require that we open the way, through interpretive expansion of the concept of 'labor dispute' **TO UNBRIDLED ATTACKS UPON COMMERCIAL INTERESTS WHICH MAY BY CHANCE OR**

MISADVENTURE BRUSH A UNION OR A UNION MEMBER. As appears from the decided cases, the Courts have been most liberal in holding that wherever the facts show a **BONA FIDE LABOR CONTROVERSY**, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives, the Norris-Laguardia Act is an effective bar to injunctive relief.
(emphasis added)

Simply, this means that if a union can be enjoined, then its activities are not lawful because there is an absence of a bona fide labor controversy. In Wagshal a union business agent failed to collect \$12.22 from Wagshal which was due a union truck driver. A boycott was imposed against Wagshal's delicatessen by the union which was so effective Wagshal couldn't purchase a loaf of bread for retail. These facts are very much like the activities of the Federation against the Club Bengazi, but even more so, because Wagshal actually owed this \$12.22 but the plaintiff's and their new and prospective lessees did not owe money to union members. In this regard, Judge Miller, continued in the Wagshal opinion as follows:

"* * * [B]e that as it may, no court so far as we are advised or have been able to find has ever gone so far in extending and defining the Act as to apply it to a situation where a business agent of a union, having no contractual obligation relations whatever with a proprietor of a business, takes it upon himself to act as a volunteer collection agent for a third party and attempts by threats, picketing, and boycott to ruin a legitimate business over a difference of \$12.20 between the original parties to a transaction to which the business agent was an intruder and which should have been determined in the Small Claims Branch of the Municipal Court. **TO MAINTAIN THAT SUCH GRATUITOUS INTERFERENCE ON THE PART OF THE DEFENDANT ANDRE CONSTITUTES A 'LABOR DISPUTE' WITHIN THE CAREFUL DEFINITION OF THE NORRIS LAGUARDIA ACT IS RIDICULOUS.**
(emphasis added)

Who were the original parties in Bengazi wage defalcations? Who had the contractual obligation? Who was the volunteer collection agent? and Who was the intruder? The parties consisted of an operator, Paul Mann and various union musicians including, Nat Nazarro, Paul Drinkard, Oscar Peterson, etc. It was Paul Mann alone who had obligations on contracts with these performers. And it was the Federation who acted as volunteer collection agent and the intruder.

If anything was left unsaid in the Wagshal decision, only recently the sixth judicial circuit had occasion to consider a similar activity of the same defendant in *AMERICAN FEDERATION OF MUSICIANS v. STEIN* (June 16, 1954) 213 F.2d 679, certiorari denied 75 S Ct 108. Stein filed a suit in libel and to enjoin the Federation from circulating his name on its unfair list. He had contracted with a Federation member for two appearances with his band in Memphis, Tennessee. The band failed to appear whereupon, Stein submitted his claim to the Federation's arbitration committee. The claim was not satisfied so Stein filed suit against the bandleader and the claim was settled out of court. Because Stein filed suit in the County Court, the American Federation of Musicians placed Stein on its Unfair List which was published and circulated in its official journal throughout the United States and Canada. In a unanimous opinion for the court, Judge McAllister held that the controversy between the bandleader and Stein was a plain case of breach of contract and did not grow out of a labor dispute within the meaning of the Norris-Laguardia Act.

By the foregoing appellants have established that the activities of the Federation are unlawful under federal law. Thus, in Count One it was alleged that the above mentioned activities interfered with existing and prospective leases. And of course a lease is a contract. The reasonable expectancy of a contract is a property right. *HARDY v. ERICKSON*, 36 NY 2d 823. Interfering with existing or preventing execution of a contract is actionable. *COLEMAN v. WHISNANT* (N.C.) 35 SE2d 647; *BEKKER v. EQUITABLE LIFE ASSURANCE SOCIETY*

293 NW 200; See also **MEASON v. RALSTON PURINA COMPANY**, 107 P2d 224 and **PROSSER ON TORTS**, infra, Sec. 20. It has also been held that an action lies for maliciously and wrongfully preventing one from entering into a contract where the evidence establishes, but for the interference, the contract would have been made. (**CCA-Md. 1912**) **LEWIS v. BLOEDE** 202 Fed. 7. To the same effect is **BALLET RUSE v. THEATRES CORP.** (**CCA-NY**) 133 F2d 187. A labor organization has been held equally liable with a perpetrator where the union provoked and instigated the wrong. **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. N. L. R. B.** 181 F2d 34, affirmed 341 US 694. The act is malicious when the thing done is with knowledge of plaintiff's rights and with intent to interfere therewith without legal justification. **MEYER v. WASHINGTON TIMES COMPANY**, 64 App. D.C. 223; 76 F. 2d 988. A labor organization has been held liable for causing and inducing a breach of contract whether a conspiracy was proved or not. **KETCHER v. SHEET METAL WORKERS INTERNATIONAL ASSOCIATION** (E.D. - Ark) 115 F. Supp 802. The Supreme Court held that where an actionable prevention of performance of contract is shown, it is no defense that there is lack of certainty that contract would be completed but for the interference. **ANGLE v. CHICAGO - ST. PAUL RAILWAY**, 151 US 1. For acts transcending bounds of legitimate union activity see **BAUTISTA v. JONES**, 155 P2d 343.

In Count Two it was alleged that the above mentioned activities of the Federation are unlawful and in violation of the anti-trust laws. **UNITED STATES CODE**, Title 15 Secs. 1-17, et seq. Commerce as used in said sections means trade or commerce within the District of Columbia exclusively. See Secs. 3, 12. It has been expressly held that under the above sections no question of the interstate character of trade or commerce arose within the District of Columbia. **AMERICAN MEDICAL ASSN. v. U.S.** (1942,) 130 F2d 233, 76 US App DC 70 Affirmed 63 S Ct 326, 317 U.S. 519. Cleaning, dyeing and renovating clothing within the District of Columbia constituted trade or commerce.

ATLANTIC CLEANERS & DYERS, INC. v. U.S. (1932) 52 S Ct 607, 286 U.S. 427. Personal services are included in the word "trade". U.S. v. NATIONAL ASSOCIATION OF REAL ESTATE BOARDS (1950) 70 S Ct 711, 339 US 485. The business of rendering employment and counselling services within the District of Columbia is a trade. DARNELL v. MARKWOOD (Dec. 1954) 220 F2d 374, 95 US App DC 111. Trade or commerce has been held to include the business of producing, booking, and presenting legitimate attractions on a multi-state basis. US v. LEE SHUBERT, et al (1955) 75 S Ct. 277, 348 US 222 or the interstate transportation of films, BINDERUP v. PATHE EXCHANGE, 263 US 291, 44 S Ct. 96, 68 L. Ed 308, even though the actual showing of a local motion picture is a local affair. US v. CRESCENT AMUSEMENT CO., 323 US 173; 65 S Ct 254, 89 L. Ed 160.

However, it may be argued that the appellee-unions are exempt from such liability under anti-trust laws as being unincorporated labor organizations unless they have acted in combination with an employer or an employer group to suppress competition. ALLEN B RADLEY COMPANY v. LOCAL UNION #3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (1945) 325 US 797, 65 S Ct 1533. But, on the other hand, the Allen Bradley decision, *supra*, and US v. HUTCHESON 61 S Ct 463, 312 US 219, 85 L. Ed 788 require that the union-employer combination is to be determined by reading, as a harmonizing text, the Norris Laguardia Act as whether a labor union activity constitutes a violation of the Sherman Act. The Wagshal and Stein cases discussed above considered in light of the Norris-Laguardia Act clearly demonstrates the Federations activities are unlawful because they do not involve a legitimate labor dispute or controversy.

It has been held in numerous courts that Secs. 1-7 of the Sherman Act are inapplicable to labor where the union is engaged only in furthering a trade union activity in connection with a labor dispute. LOEW's INC. v. BASSON (DCNY-1942) 46 F Supp 66; and it must be incidental to a labor

dispute concerning terms and conditions of employment, **CONSOLIDATED TERMINAL CORP. v. DRIVERS, HELPERS & CHAUFFEUR'S LOCAL UNION #639**, (DCDC) 33 F Supp 645.

The principle has been most recently enunciated in **I. P. C. DISTRIBUTORS v. CHICAGO MOVING PICTURE MACHINE OPERATORS UNION, LOCAL #110**, (DC Ill. - 1955) 132 F Supp 294 where the Court held that under the provisions of the Norris Laguardia Act labor unions and their members are excepted from Anti-trust laws when they are lawfully carrying out the legitimate objects of such organizations and are engaged in a labor dispute.

Whereas, the principle of the Allen Bradley decision has been most recently reaffirmed in **NEW BROADCASTING COMPANY v. KEHOE** (DCNY-1950) 94 F. Supp 113 where the labor organization was actually engaged in advancing legitimate aims of its members and involved in a labor dispute it could only incur liability under the Sherman Act upon entering into a combination with employers who are themselves violating the Sherman Act.

It having been established that a labor organization is subject to the Sherman Act; and that the Federations activities are unlawful, we now turn whether such violations are the subject of liability and damages pursuant to the Sherman Act. The Supreme Court has held that restraints occasioned by unlawful blacklists, boycotts, coercion, threats and intimidation made effective in whole or in part, by words or printed matter whereby a union sought to deter dealers from buying hats from a manufacturer in order to coerce such manufacturer to act favorably to a labor organization, constituted a violation of the Sherman Act. **GOMPERS v. BUCKS STOVE RANGE COMPANY**, 221 US 418 and citing **LOEWE v. LAWLER**, 208 US 274.

In **EASTERN STATES LUMBER ASSOCIATION v. UNITED STATES** ¹ the Supreme Court held that the circulation of so-called official report,

¹ 234 U.S. 600 and cited with approval subsequent to effective date of Norris Laguardia Act in **U.S. v. The Steel Co.**, 324 US 495, 522 see note 21.

in the nature of a blacklist, among members of retail dealers and members of the defendant union calling attention to actions of the blacklisted wholesale dealer in selling direct to the consumer, tending to prevent members of the association and the union from doing business with the dealers listed and referred to in such report, and to directly and unreasonably restrain trade by preventing it with such listed dealers, amounted to a violation of the Sherman Act.

A review of the foregoing authorities clearly demonstrates that the appellees are liable to plaintiff's in damages on count two of the complaint.

On count three of the complaint a cause of action in libel is stated asserting that the appellees wrongfully blacklisted the Club Bengazi thereby injuring the character and good name of the property owned by appellants; and that they personally were libeled because the Defaulters List would impute to plaintiff-Appellants, as owners of the property housing the Club, that they were actually indebted to Federation members rather than their former lessee.

This claim lies on the early common law principle sometimes known as "slander of title". On this subject Professor William L. Prosser, in PROSSER ON TORTS, West Publishing Company, Hornbook series, 1941, Chapter 20, Sec. 106, stated as follows:

"The publication of false statements disparaging the plaintiff's title to his property, or its quality, or the character or conduct of his business, is actionable if it results in special damage in the form of pecuniary loss due to the refusal of others to deal with him. * *

* * * The earliest cases, which arose shortly before 1600, involved oral aspersions cast upon the plaintiff's ownership of land, by which he was prevented from leasing or selling it; and from this the tort acquired the name of "slander of title." (citations omitted and emphasis added) at page 1036.

It is obvious from the uncontradicted testimony of Lorenzo Middleton, for example, that he would not execute a lease for one year at a rate of \$600.00 monthly with appellants because the Club Bengazi was on the blacklist; and that he could not obtain union musicians; and that he believed he could not operate the Club successfully without union musicians.

Insofar as blacklisting is concerned, a letter written by union officials blacklisting former union members engaged in so-called scab activities has been held to be "libelous per se". **ARNOLD v. NATIONAL UNION OF MARINE COOKS & STEWARDS**, 219 P.2d 121, where the present appellees placed a booking agent on its unfair list, it was held to be unlawful and enjoinable, **AMERICAN FEDERATION OF MUSICIANS v. STEIN** (1954-CCA6th) 213 F2d 679, supra. A Missouri District Court has ruled that any trespass upon intangible property, such as good will, stated a cause of action analagous to "slander of title". **MANN v. FISHER**, 51 F. Supp 550. Thus it is perfectly clear, from the foregoing authorities, that the complaint stated and the appellants evidence provided a casue of action on count three.

Unquestionably, the appellees will rely heavily on the case of **MIAMI FEDERATION OF MUSICIANS, LOCAL #655, AMERICAN FEDERATION OF MUSICIANS, et al v. WOMPEARCE, INC., et al**, (1954) 70 So. 2nd 298, a Florida decision in its state courts which has several similarities to the issue involved on this appeal. It considers the same National Defaulters List a credit system and declares that the listing of the lessor as a defaulter for non-payment of a lessee's debts as not in itself unlawful; and that under Florida law union persuasion by boycott are within the ambit of legitimate labor activity.

Here however, the appellants do not dispute that the defaulter's list is not by itself unlawful provided it lists only persons actually indebted to union members; and that the boycott is imposed against the indebted person who seeks to obtain the services of the Federation members. Thus, it is important to distinguish the facts and the applicable law of the Wompearce and Bengazi cases.

In Wompearce the plaintiffs were the lessor and lessee, in Bengazi it is the lessor; the suit in Wompearce is for an injunction and loss of profits from non-operation of Plaza Theatre, in Bengazi the claim is for injunction, loss of rentals and dissipation of good will; in Wompearce the union boycotted not the Plaza Theatre but Danny Brown, a sublessee, who was already ON THE DEFAULTERS LIST HIMSELF, in Bengazi the boycott extended to all lessee's who never hired union musicians previously, except, that the boycott was not enforced against Louis Murray who actually was on the defaulters list, because he agreed to pay off the old debt; in Wompearce it was sought to enjoin the union from enforcing its own rules against Danny Brown, a deadbeat, in Bengazi the claim is for interference with leases, anti-trust violations and slander of title as between innocent lessees and appellants; in Wompearce the members of the Local union were injured by loss of employment and thereby resorting to single engagements, in Bengazi National travelling members performed while on tour of the country, and there was no local problem of unemployment; in Wompearce the court was not bound by the Wagshal decision nor subject to persuasion by the Stein decision; in Bengazi the Wagshal, Stein decisions and the Norris-Laguardia Act must be construed in the light of evidence that the union did not merely pass on credit information but acted as a collection agent by threats and extortion.

II.

Appellants Have Been Denied a Fair Trial Due To Misconduct of Counsel and Undue Interference by the Trial Judge.

a) Opposing counsel, Hyman Smollar, Esquire, was guilty of deliberate misconduct in the following respects:

I. Appellants were compelled to request a mistrial on the opening statement of defendant when counsel advised jury that the Supreme Court of Florida said the conduct of the Federation was legitimate. (J. A. 34)

II. Counsel interrupted direct examination of appellant and stated in open court that he had a lease "in the case of Feldman against Johnson, and the number is 4704-49". (J. A. 40)

III. Counsel accused Appellant's counsel of admonishing his own witness in open court on direct examination. (J. A. 55)

IV. Counsel in open court objected to question asked witness on direct on the ground that "we claim the statute of limitations bars any activity or any claim for activity prior to 1951". Appellant strenuously objected that stating any defenses is highly improper. (J. A. 56)

V. Counsel continually would not allow the witness to fully answer the question. (J. A. 78) Upon objection counsel stated in open court, "This is the kind of an instruction I appreciate, Your Honor". (J. A. 71)

VI. Counsel stood between witness and appellants counsel to deliberately obstruct view. Upon objection, counsel retorted, "That is the first valid one I have heard." (J. A. 74)

VII. After Court admonished appellants counsel of Bennie Caldwell's unsavory character (J. A. 49) counsel for appellants carefully avoided the issue so as not to open door for their

opponents, but, defense counsel deliberately attempted to elicit such prejudicial testimony. Knowing that Caldwell was incarcerated counsel asked, "Do you have any idea of where he is now?" (J. A. 74)

VIII. Defense counsel and his co-counsel conversed within hearing of jury as to answers given by the witness on cross-examination. (J. A. 75)

IX. Counsel then exhibited an unidentified paper within four feet of the jury box while examining a witness. Upon objection, counsel retorted, "Very well, Your Honor, it is only that I am suspect, I will get away as far as I can." These comments upon motion were stricken, but not from the mind of the jury. (J. A. 75)

The foregoing demonstrably illustrates the misconduct of counsel and his attempt to dominate not only counsel for appellant, the jury but the Court as well.

The trial judge completely misconceived the plaintiff's case which resulted in prejudicial and restrictive rulings. The Court caused confusion by requiring appellant to testify first (J. A. 35) when plaintiff was prepared to prove its case through other witnesses. The error of Court in this ruling required appellant to later complain as to the resulting prejudice (J. A. 43 & 53). The Court was further confused when it was shown that appellant did not know what union was doing (J. A. 39). Plaintiffs were not permitted to show improvements made to Club (J. A. 36-7) the terms of Louis Murray's lease (J. A. 41-2) the conversations of Murray and appellant (J. A. 44-5-6 & 48) Mr. Brown (J. A. 47) Bennie Caldwell (J. A. 49) Buck Hill (J. A. 50) Doctor Cowan and Lorenzo Middleton and Jimmie McPhail (J. A. 63) which all concerned the activities of the Federation and its effect upon each witness. The Court refused to permit leading questions on re-direct examination (J. A. 76), but permitted opponents much latitude

on re-cross examination (J. A. 77), refused to permit Murray to express an expert opinion (J. A. 84) allowed inquiry into personal affairs on witness not brought out on direct (J. A. 71-2) refused testimony permitted within period asserted in pre-trial order (J. A. 49-50). The rulings were the result of the court's predetermined opinion that appellants didn't have an anti-trust case (J. A. 54) that the union had a right to collect money (J. A. 58-9) and that the union activities concerned the internal affairs of its members (J. A. 94).

Appellants also urged the Court that since the appellee made an opening statement before plaintiffs case, that they had waived the right to make a motion for directed verdict at end of plaintiff's case (J. A. 91 and 35) since making the statement conceded that plaintiff had stated a prima facie case to the jury. Further, appellant contended that the ruling of Judge Tamm (J. A. 17-18) denying the appellee's motion for summary judgment was res judicata as to whether a prima facie case had been stated and proved in Counts two and three (J. A. 33).

Appellants earnestly assert that serious error occurred when the Court refused to permit the testimony of appellant concerning the execution of the above mentioned agreements, leases, checks and writings as being hearsay because not done in the presence of the defendants. Appellant claimed that the hearsay rule did not apply; and that such chain of circumstances were part of the res gestae. (J. A. 44-5-6) This ruling prevented appellant from not only showing the unions activities with his property, but disallowed him the right to give the reasons told to him as to why the lessees refused to sign the agreements and leases.

The law amply supports appellants position. In CASEY v. CINCINNATI TYPOGRAPHICAL UNION NO. 3 (CCA Ohio 1891) 45 F. 135; 12 L. R. A. 193 on a motion for an injunction to restrain a conspiracy to boycott a newspaper, statements of defendants repeated to a solicitor of plaintiffs, was held to be part of the res gestae. Professor

John Henry Wigmore in his treatise EVIDENCE IN TRIALS AT COMMON LAW, 3rd Edition, 10 volumes, Little, Brown & Company, 1940, in Volume VI Sec. 1770 et seq. clearly demonstrates that such utterances are verbal acts and constitute part of the issue, especially in regard to acts of payment, sale, loans or gifts. Sec. 1777. Testimony relating to a contract of assignment and the conversations connected therewith was admitted in VIRGINIA MACHINERY & WALL COMPANY v. HUNGERFORD COAL COMPANY, 182 Va. 550, 29 S.E. 2d 359. In a suit for realty commissions, the conversations between plaintiff and intended purchasers were admitted as part of the res gestae. HOUSE v. HORNBERG (N. Y. 1943) 39 NYS2d 20. In another case where a claim was made for recovery of commissions for sale of real estate, the conversation between the plaintiff and purchaser was held admissible (NH 1949) EMERY v. WOODWARD, 96 N.H. 61, 69 Atl. 2d. 365.

The error was compounded when conversations between appellant with Louis Murray and Lorenzo Middleton concerning their leases was excluded even though they were available as witnesses for cross examination. The reason for the hearsay rule is to exclude a statement made out of court by a person not subjected to cross examination. WIGMORE, supra. Sec. 1690.

Thus, the Court's prohibitive and restrictive ruling seriously affected the proof of liability and damages in presenting its case.

III.

The Court Erred in Granting the Defendants' Motion to Require the Plaintiffs to Produce Joint Federal and District of Columbia Income Tax Returns and Property Tax Returns.

At pre-trial each defendant obtained leave to file a motion pursuant to Rule 34, Federal Rules of Civil Procedure requiring plaintiff's to produce income and property tax returns. Subsequently, the District Court, sitting in Pre-trial Division, granted the motion and an order

was entered (J. A. 29) compelling plaintiffs to produce their joint or separate Federal and District of Columbia income tax returns and personal property returns for the years 1947 through 1955; if not available, to execute an authorization permitting counsel for defendants to obtain copies thereof.

In order to avoid civil contempt action by the Court, plaintiffs executed such authorizations as required by the order. Plaintiffs opposed such action and refused to produce such returns voluntarily.

a) With regard to secrecy of the District of Columbia personal property returns, this is governed by the provision of the District of Columbia Code, Sec. 47-1412. Such returns are regarded as confidential and only where the District or the United States or a litigant is proceeding in a Court pursuant to Title 47. Obviously, the defendants here are not proceeding pursuant to any law but are defendants in a civil suit and seek to obtain such returns as part of a fishing expedition. Accordingly, the order requiring production of personal property tax returns was entered in violation of the express prohibition of the law.

b) With regard to secrecy of the District of Columbia income tax returns, this is governed by the provision of the District of Columbia Code, Sec. 47-1564c. This section is even more specific than the above quoted section, wherein it states that not even copies shall be furnished even though the request is contained in a court order unless the District or the United States is interested in the litigation. Thus, the Courts order seeks to do indirectly what it cannot do directly when it required plaintiffs to authorize counsel for defendants to obtain such copies for a private litigation. This is unlawful.

c) The order for production of federal income tax returns presents a more complex problem since all federal courts do not agree as to extent of the privilege contained in the governing provision of the United States Code Title 26, Sec. 6103. ¹A District Court has held that income

¹ formerly Sec. 55, United States Code, Title 26.

tax returns are confidential communications between plaintiffs and the government and not available to third parties. *AUSTIN v. ALUMINUM CO. OF AMERICA*, D.C. Tenn. 1954, 15 FRD 490. Thus, where the United States was not an interested litigant, another District Court refused to subject such returns to inspection under the federal rules relating to discovery procedures. *O'CONNELL v. OLSEN & UGELSTADT*, D.C. Ohio, 10 FRD 143. Another District Court went so far as to preclude public disclosure even though the tax payer voluntarily produced them at a deposition stating that they were confidential within the meaning of Section 55¹. *BAIM v. BLANK, INC.* D.C. N. Y. 1955, 17 FRD 346.

Section 6103a clearly states that such tax returns shall be open to inspection only upon order of the President of the United States or as Congress has authorized in subsequent section with the approval of the President. Thus, plaintiff's contend that an ordinary subpoena duces tecum or a Court order requiring the President or his department head to produce such income tax returns, is legally ineffective because the President was granted exclusive authority and discretion in revealing a taxpayer's returns. This authority is expressly contained in the statute itself. Unless the confidential nature of the return is preserved by the Courts, not only will the intention of Congress be frustrated, not only will the authority and discretion of the President be dissipated, but such communications by the taxpayer to the government will be strained by fear of subsequent public disclosure. For an interesting discussion on the matters discussed herein see *BLAIR, Commissioner of Internal Revenue v. OESTERLEIN MACHINE CO.*, 1927, 57 App. DC 75.

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formerly Sec. 55, United States Code, Title 26.

IV.

The Court Erred in Granting Defendants' Motion to Amend Answer to Include Affirmative Defenses of Statute of Limitations and Laches.

Rule 8, Federal Rules of Civil Procedure, Sec. (c) Affirmative Defenses states that a defendant must affirmatively set forth the defenses of laches, and inter alia, the statute of limitations. Each defendant filed its answer in this cause on February 7th, 1955 and no affirmative defenses were asserted therein. After the cause had been pre-tried on April 9th, 1956, a motion was filed and defendants were allowed to file amended answers asserting laches and statute of limitations over opposition of plaintiffs. (J.A. 28) In this regard the Court abused its judicial discretion as limited and defined below.

Rule 12 (b) Federal Rules of Civil Procedure states in part that:

"Every defense, in law or fact, to a claim for relief in any pleading, * * *, SHALL be asserted in the responsive pleading thereto if one is required * * * (emphasis added)

The only claim made by the plaintiffs in this cause was contained in the original complaint which still remains in effect without amendment.

Rule 12 (h), F.R.C.P. provides that a party who fails to plead any defense in his answer or subsequent responsive pleading, it is waived. In ROE v. SEARS ROEBUCK & COMPANY, (CCA7th, 1943) 132 F2d 829, the defense of statute of limitations was waived where it was not included in the answer. Furthermore, before the Court may relieve a defendant from the waiver, such defendant must make an affirmative showing pursuant to Rule 60(b), F.R.C.P. BERRIOS v. BAETJER (Puerto Rico 1942) 6 FR Serv 60b. 24 Case 1.

It is recognized that amendments are freely granted pursuant to Rule 15, F.R.C.P. when justice so requires. Especially where the

plaintiff later amends its complaint. However, it has been held that even where plaintiff did amend the complaint to allege capacity to sue, such amendment did not change the cause of action so as to permit the addition of defense of statute of limitations. *FIERSTEIN v. PIPER AIRCRAFT CORP.* (D.C. Pa. 1948) 79 F. Supp. 217. Likewise, defendants have made no showing that justice requires such amendments to their answer in view of the fact that no new matter gave rise to such amendments and could have been pleaded in the original answer.

Defendants make a bare allegation of laches in its amended answer. (J.A. 30) yet, Rule 8(c) requires that laches be affirmatively pleaded. Assuming without admitting that plaintiffs delayed bringing suit, defendants must allege in its affirmative defense how it, the delay, worked to the prejudice of the defendants. Laches is an equitable defense. It cannot be invoked to defeat justice, but only where the enforcement of an asserted right will work an injustice. *SHELL v. STONE* (C.C.A. Kan. 1945) 151 F2d 909. The defendant made a bare allegation of laches in *R. F. C. v. GOLDBERG*¹, but the defense was rejected because the defendant failed to allege how or in what manner the delay worked to his prejudice; and that the bare allegation was not sufficient to establish laches as a defense within the period covered by statute of limitations. Finally, in *INLAND MOTOR FREIGHT v. U.S.* (D.C. Wash. 1945) 60 F. Supp. 520 the Court held that a mere lapse of time, in itself, was not sufficient to justify interposition of the affirmative defense of laches, but it must be shown, in addition, that such lapse of time worked to the disadvantage of the defendant, or as stated in *NATIONAL SUPPLY COMPANY v. HILLMAN*, (D.C. Pa. 1944), 57 F. Supp. 4, proof must be shown that plaintiff's delay in bringing suit gave plaintiff some advantage.

The above discussion clearly demonstrates that not only did the Court abuse its judicial discretion in granting defendants leave to amend but the defendants themselves failed to make a proper showing to entitle them to such relief at this late date.

¹ C.C.A. 111, 1944, 143 F.2d 752, certiorari denied 65 S.Ct. 117, 323 U.S. 770 rehearing denied 65 S.Ct. 266, 323 U.S. 817.

CONCLUSION

It is respectfully submitted that the judgment of the United States District Court in ordering and directing the jury to return a verdict for the appellees at the conclusion of the appellants case be vacated, set aside and held for naught; and that a new trial be ordered on each count of the complaint.

In addition it is requested that the Court upon a retrial of this cause, and upon application of the appellants, the orders granting leave to amend the answer to include affirmative defenses and to produce District of Columbia income and property tax returns and federal income tax returns be vacated and set aside and held for naught.

The trial Court should be further instructed to abide by the decision of this Court in ruling on evidentiary matter and the conduct of the trial with an admonishment to opposing counsel concerning his misconduct.

It is further requested that appellants be granted leave to amend its complaint to allege a fourth cause of action claiming violation of right to privacy by offensive collection methods of appellees upon the authority of the recent decision by the Ohio Supreme Court in *HOUSH v. PETH*, 133 N.E. 2d 340 as read in conjunction with *CLARK v. ASSOCIATED RETAIL CREDIT MEN OF WASHINGTON*, D.C. (1933) 70 US App. D.C. 183.

Finally, it is respectfully requested that this Court, in exercising its judicial discretion, award the costs of this appeal to appellants regardless of the outcome of this appeal.

Respectfully submitted,

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(i)

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JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

380 [Filed December 20, 1954]

MORRIS JOHNSON)

and)

DOROTHY JOHNSON)

1603 Massachusetts Avenue, N. W.)

Washington 5, D. C.)

Plaintiffs)

vs.)

Civil Action No.)

5361-54)

AMERICAN FEDERATION OF MUSICIANS)

An unincorporated labor organization)

1836 - Ninth Street, Northwest)

Washington, D. C.)

MUSICIANS PROTECTIVE ASSOCIATION -)

LOCAL # 710)

An unincorporated labor organization)

1836 - Ninth Street, Northwest)

Washington, D. C.)

MUSICIANS UNION-DISTRICT OF)

COLUMBIA FEDERATION - LOCAL #161)

1105 - Sixteenth Street, Northwest)

Washington, D. C.)

An unincorporated labor organization)

Defendants)

COMPLAINT FOR DAMAGESCOUNT ONE

(Unlawful interference with right to contract)

1st: The matter in controversy exceeds the sum of \$3,000.00
exclusive of interest, attorneys fees, protest fees and Court costs.

Plaintiffs are residents of the District of Columbia, and each defendant is an unincorporated labor organization, maintaining offices and doing business within the District of Columbia. Jurisdiction over this action is conferred upon this Court by Title 11, Section 301 et seq., District of Columbia Code, 1951 Edition as amended.

2nd: Plaintiffs bring this suit in their own right as adult citizens of the United States, as residents of the District of Columbia, and as husband and wife who hold, as tenants by the entireties, the land and improvements thereon at 1423-1425 You Street, Northwest, within the confines of the District of Columbia, and better known as the Club Bengazi; that the defendant, American Federation of Musicians, is sued herein as an unincorporated parent labor organization of an undetermined

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number of thousands of individual members with hundreds of local affiliates throughout the United States which are governed by a national constitution and by-laws promulgated and binding upon themselves; that it is a labor union governed by an international executive board consisting of James C. Petrillo, President; C. L. Bagley, Vice-President; Leo Cluesmann, Secretary; Harry J. Steeper, Treasurer and Herman D. Kenin, George V. Clancy, Stanley Ballard, William J. Harris and Walter M. Murdock, Executive Board Members; and that the defendant, Musicians Protective Association, and the defendant, Musicians Union, District of Columbia Federation, are sued herein as local affiliates of parent organization, American Federation of Musicians, the first defendant named herein.

3rd: Each defendant is primarily composed of specially talented members who are engaged in the professional entertainment field for their livelihood. These members consist of not only those who are adept at performing with all types of sundry and various musical instruments, but also virtually every type of entertainer such as vocalists, acrobats, dancers, jugglers, comics and the like. Throughout the United States the parent organization acting through its affiliates dominates and controls the field of entertainment to the virtual exclusion of any other

organization in each of the 48 states and the District of Columbia. The activities of each defendant directly affects the flow of entertainment and members of its profession in interstate commerce.

4th: In order to give maximum benefits and protection to its individual members who perform throughout these 48 states, each defendant guarantees that their fees for services performed at a given establishment will be paid by each defendant should an operator of such establishment default on his contract for services with the individual member.

5th: To recoup its losses for such payments made to the individual members by the parent organization as related above, each defendant exerts economic and coercive pressure against the establishment, rather than the defaulting operator. Thus, each defendant by its constitution and by-laws have established and maintain a National Defaulters List, whereby any defaulting establishment, which could be a corporate restaurant, night club, cabaret, is blacklisted as a discredited business

382 organization and management. Whether the defaulting party was an absconding lessee, a bankrupt operator, or otherwise is considered immaterial because it is the announced policy of the defendant union to hold the establishment liable as evidenced by exhibit F attached hereto and made a part hereof. The National Defaulters List is published by the defendants in their monthly publication entitled "International Musician".

6th: When an establishment is blacklisted and communicated in the above manner throughout the nation, the local affiliates and its members are not permitted to contract for or perform in any such establishment until it is removed from the National Defaulters List. The blacklist is imposed against the establishment and not the defaulting individual irrespective of who the owner or successor lessee might be.

7th: This method of policing and enforcing the National Defaulters List is very effective because the establishment is located and so constructed as to accomodate live entertainment. Its good will is such live entertainment and it can be provided only by the defendant union. This good will is dissipated and destroyed when such live entertainment is

systematically boycotted and withheld from such establishment and the loss of this asset must be assumed by the owner thereof. In order to operate the Club Bengazi successfully, its operator must provide live entertainment to his patrons. However, the Club Bengazi is now and has been since 1946 appearing as an establishment in default on the National Defaulters List. Because of the foregoing, plaintiffs have been unable to lease the Club Bengazi since being placed on the National Defaulters List except as indicated in paragraph ten below. Upon learning from the defendant union that the Club Bengazi was a blacklisted establishment, prospective lessees of plaintiff would refuse to rent the same because they were not legally nor morally obligated to pay and satisfy such indebtednesses as enumerated in paragraph eighteen below.

8th: Plaintiffs are informed and believe that Paul Mann and Ralph Feldman, former lessees and operators of the Club Bengazi, defaulted on their contracts with members of the American Federation of Musicians; whereupon the Club Bengazi and each plaintiff, as owner thereof, were placed on the National Defaulters List and the same was published in its monthly publication known as the "International Musician" and in publications of the local affiliates; and that the Club Bengazi as well as each plaintiff, being the owners thereof, remain blacklisted on the National Defaulters List to the date of filing this complaint as evidenced by letter of the American Federation of Musicians dated November 12, 1954 which is identified as plaintiff's exhibit F and is attached hereto and make a part hereof.

9th: Plaintiffs have continuously endeavored to lease the Club Bengazi and later offered to sell the Club Bengazi and its good will to prospective and interested operators since having been blacklisted and boycotted by the American Federation of Musicians; that plaintiffs either obtained signed leases or had completed satisfactory negotiations just short of execution, but after an investigation was made by the prospective lessee and being advised of such blacklisting, said persons would refuse to honor leases formerly executed or would refuse to sign the

lease in the instances where not yet executed; that such refusal was premised on the calculated and effective program of each defendant of circulating information to the entertainment world that the Club Bengazi was blacklisted. Said leases, identified as Plaintiff's exhibits B, C, and D are attached hereto and made a part hereof.

10th: Plaintiffs successfully obtained a two year lease for the Club Bengazi during the period in question from Louis Murray but plaintiffs were required to reduce rentals monthly to less than one half . Murray obtained live entertainment from the American Federation of Musicians upon entering into an agreement with each defendant to make monthly payments on the so-called indebtedness of the Club Bengazi toward having same removed from the National Defaulters List. Said lease, being identified as plaintiff's exhibit A, is attached hereto and made a part hereof.

On the 12th day of November, 1948 plaintiffs and Louis Miller executed a conditional sales agreement for the purchase and sale of the Club Bengazi, its assets and its good will. But because of the foregoing conduct by each defendant this agreement never matured resulting in a loss to plaintiffs in the sum of \$35,000.00. Said agreement, identified as exhibit E, is attached hereto and made a part hereof.

11th: As a result of the foregoing each defendant knowingly, intentionally by unlawful means without justification or excuse, interfered with existing leases and conditional sales agreements and also

384 interfered with leases about to be executed. See exhibits of plaintiff attached and identified as A B C D and E; that such deliberate and premeditated process of interference and extortion has been employed by the defendants from June of 1947 until the filing of this complaint.

12th: The defendant union's course of conduct described in the premises constitutes the crime of extortion within the meaning of Title 18, U.S.C.A. Section 1951, entitled "Interference with commerce by threats or violence".

13th: As a result of the foregoing the good will of the Club Bengazi has been completely dissipated thereby causing damages to the plaintiff's

in the sum of \$35,000.00 as shown by plaintiff's exhibit E for identification; and further plaintiff's suffered loss of rental income from, to-wit:, on or about June of 1947 to the filing of this complaint in the amount of \$42,000.00.

WHEREFORE, the premises considered, each plaintiff respectfully prays and demands judgment against each defendant named herein in the sum of Seventy-seven Thousand Dollars (\$77,000.00) as their compensatory damages, the additional sum of One Hundred Thousand Dollars (\$100,000.00) as their exemplary and punitive damages, totaling the sum of One Hundred Seventy-seven Thousand Dollars (\$177,000.00) plus fees for their attorneys and costs of this suit.

COUNT TWO

Action for Treble Damages under the Sherman Act, et seq.

14. Plaintiff's do hereby incorporate and adopt by reference, all of the allegations set forth in paragraphs two through thirteen in Count One of this Complaint.

15. The action in this Count is instituted against each above named defendant under Section 4 of the Act of Congress of July 2, 1890, chapter 647; 26 Stat. 209, as amended, and entitled "an Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Antitrust Act, and under Section 15 of the Act of Congress of October 15, 1914, Chapter 323, 38 Stat. 730, as amended, commonly known as the Clayton Act; in order to prevent and restrain continuing violations by each defendant, as hereinafter alleged,

385 of Sections 1 and 2 of the Sherman Antitrust Act and of Section 7 of the Clayton Act.

16. The defendant labor organization named above including its officers specifically enumerated in Count One herein are hereby sued as a class. They constitute a class of persons having identical interests in the subject matter of this action and are so numerous as to make it impracticable to bring them all before this Honorable Court. In so

far as the character of the right sought to be enforced against them by this action, such is several and the questions of law and fact affecting their several rights are common, and a common relief is sought against them. The joinder of the parent defendant, American Federation of Musicians, and its affiliates doing business in the District of Columbia, hereinbefore specifically named as parties defendant will fairly insure the adequate representation of all members of the defendant union and its remaining affiliates throughout the 48 states.

17. The acts and conduct of the defendants and their co-participants hereinbefore referred to constitute a combination and conspiracy in restraint of trade and commerce in the entertainment field among the several states, the monopolizing of a part of such trade and commerce, an attempt to monopolize a part of such trade and commerce, and a combination and a conspiracy to monopolize the same.

18. In carrying such plan, scheme and conspiracy into effect, i. e. with regard to the National Defaulters List as alleged in paragraphs two to thirteen in Count One herein, each said defendant, and other members of said labor organization, cooperating and conspiring with said defendants, have already notified each plaintiff and all of their prospective lessees throughout the period complained of herein, that unless they or their lessees enter into contracts with said labor organization whereby plaintiffs and/or their lessee will satisfy the indebtedness of \$3,561.00 due to its members, namely, Erroll Garner, Charles Brown, Nat Nazzaro, John Kirby, Carl Drinkard and Oscar Peterson, an indebtedness that was incurred by Paul Mann and Ralph Feldman, former lessees of each plaintiff, whereupon plaintiffs or their new lessee will not be permitted to contract with members of its union for their professional entertainment services relating to performances at the Club Bengazi,

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which would in effect mean that the plaintiffs and/or their lessee would not be able to operate the Club Bengazi without such live entertainment. Several attempts to operate the Club Bengazi as a restaurant and cocktail lounge have resulted in financial failure because it is suitable only as a nightclub with live entertainment.

19. Unless the defendant's are restrained from their unlawful interference with the product of entertainment in interstate commerce, as herein set forth, plaintiffs will continue to suffer great and irreparable injury and damages as related in the premises.

20. Should a restraining order be allowed, no damages will ensue to the defendants, nor to any of its members thereof; whereas, if a restraining order is not granted, plaintiffs will suffer a monthly damage continuing throughout the entire time this suit is pending and indefinitely thereafter in the aggregate sum of \$500.00.

21. The defendant labor organization is endeavoring to coerce all entertainers throughout the United States, by the use of its National Defaulters List, into agreeing not to enter into contracts with plaintiffs and/or their lessee to supply live entertainment at the Club Bengazi; and unless enjoined or restrained by an order of this Court to abolish the use of the National Defaulters List outright or at least as it pertains to the Club Bengazi, said defendants have and will continue to effectuate its purposes and thereby secure a complete monopoly of, and control over supplying any form of live entertainment to the Club Bengazi and to others similarly situated throughout the United States.

WHEREFORE, the premises considered, each plaintiff respectfully prays and demands:

I. That a temporary restraining order and preliminary injunction be issued out of this Court upon its order directing the defendants, and each of them, their servants and employees, from in any manner interfering with plaintiffs and/or their lessee in the leasing of the Club Bengazi and the contracting for live entertainment with members of the American Federation of Musicians; and that after a trial of this cause, that said injunction be made perpetual;

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II. For a decree of this Court that the defendants, and each of them, and all of their respective agents and employees, and all persons acting or claiming to act on their behalf or any of them, be perpetually enjoined from further carrying out any act or provision relating to its

National Defaulters List, or any of its policies pursuant thereto, which is herein adjudged to be illegal, and from making, becoming a party to, or carrying out any subsequent policy or provision relating to the enforcement of the National Defaulters List, or of like character as promulgated by the defendants, and effect or purpose to any activity of such National Defaulters List which is herein adjudged to be illegal.

III. For a decree of this Court that oral or written agreements between the American Federation of Musicians and its membership which tend to create a monopoly of the entertainment field among the several states and the District of Columbia are void and illegal; and that all lists, notices, bulletins and other means of communication advising its members that the Club Bengazi is not an approved organization pursuant to its policies in enforcing the National Defaulters List, be declared illegal and such distribution or communication be restrained and enjoined preliminarily; and that after a trial of this cause, the said injunction be made perpetual.

IV. For a decree ascertaining the actual damages suffered by plaintiffs as a result of the defendants unlawful acts complained of herein, and awarding judgment in favor of the plaintiffs against each defendant for thrice the amount of said damages.

V. That the plaintiffs recover its taxable Court costs and a reasonable fee for their attorneys.

VI. That the plaintiffs have such other, further, general and different relief as the case may require and which the Court may deem proper in the premises.

/s/ Morris Johnson

/s/ Dorothy Johnson

COUNT THREE

(Action for illegal blacklisting as being libelous)

22nd: Plaintiffs do hereby incorporate and adopt by reference, all of the allegations in paragraphs one through thirteen in Count One of this Complaint.

23rd: Plaintiffs do hereby incorporate and adopt by reference, all of the factual allegations in Count Two of this Complaint.

24th: The defendant, American Federation of Musicians, during the time hereinbefore mentioned was, and still is, the publisher of a certain monthly magazine or journal known as and called the "International Musician" which journal is widely circulated and read by its members, their families and friends throughout the United States and Canada.

25th: The defendants, and each of them, contriving and intending to injure plaintiffs and deprive them of the respect, confidence and esteem particularly essential to each plaintiff's business, and contriving and intending to deprive plaintiffs and the Club Bengazi of their good name, good will, reputation and esteem of patrons of the Club Bengazi, and to bring them into disastrous scandal, ridicule and professional disrepute, before said patrons, and their clients, lessees, professional associates, friends, neighbors and acquaintances, and the public in general, did heretofore, to wit, during or about the fall of 1946 and until the filing of this complaint, falsely and wrongfully, blacklist and publish and circulate of and concerning each plaintiff, and the Club Bengazi in the said International Musician under the title and heading of "National Defaulter List"; that such characterization is a false, scandalous, defamatory and libelous per se or otherwise libelous.

26th: At all times said libel has been published and until the filing of this complaint, each plaintiff has been engaged in leasing the Club Bengazi and preserving its good will. By reasons of such publication plaintiffs and Club Bengazi has been injured in their reputation, good will and loss of rentals as alleged in Count One.

WHEREFORE, the premises considered, Plaintiffs demand judgment against all said defendants in the sum of \$77,000.00 as their special damages; and each plaintiff has otherwise been injured in his credit, reputation and has suffered great pain and mental anguish in the sum of \$100,000.00 as their general damages.

/s/ Morris Johnson

/s/ Dorothy Johnson

VERIFICATION OF COMPLAINT

DISTRICT OF COLUMBIA; ss:

MORRIS JOHNSON and DOROTHY JOHNSON, being first duly sworn on oath, depose and say that they are husband and wife who reside at 1603 Massachusetts Avenue, Northwest, Washington, D.C., that they are the plaintiffs herein; that they have read the foregoing complaint by them subscribed and know the contents thereof; and that the same are true of their own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, they believe them to be true.

/s/ Morris Johnson

/s/ Dorothy Johnson

SUBSCRIBED and SWORN to before me this 17th day of December, 1954.

/s/ Sebastian D. Natale
Notary Public

My commission expires
October 31, 1958.

/s/ Edward John Skeens
Attorney for Plaintiffs
* * *

/s/ E. Harold Patterson
Attorney for plaintiffs
* * *

JURY DEMAND

Plaintiffs demand a trial by jury on all issues and all counts of this complaint.

/s/ Edward John Skeens
Attorney for the Plaintiffs

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[Filed February 7, 1955]

ANSWER OF DEFENDANTS

First Defense

The complaint fails to state a claim in any of its three counts against the defendants upon which relief can be granted.

Second Defense

COUNT ONE

1. Defendant American Federation of Musicians admits the allegation of paragraph 1 that it is an unincorporated labor organization but denies that it maintains offices or does business within the District of Columbia. Defendants Local 710 and Local 161 admit that they are unincorporated labor organizations maintaining offices and doing business within the District of Columbia. Defendants allege that they are without
391 knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 1.

2. Defendant American Federation of Musicians admits the allegation of paragraph 2 that it is an unincorporated labor organization with thousands of individual members and hundreds of local affiliates throughout the United States which are governed by a national constitution and by-laws and it further admits that it is governed by an international executive board consisting of the individuals named in paragraph 2 of the complaint. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 2.

3. Defendants admit the allegation of paragraph 3 that they are primarily composed of especially talented members who are adept at performing with all types of sundry and various musical instruments. They deny that their membership includes "virtually every type of entertainer such as vocalists, acrobats, dancers, jugglers, comics and the like". Defendant American Federation of Musicians denies that through its affiliates it dominates and controls the field of entertainment to the virtual exclusion of any other organization in each of the 48

states and the District of Columbia. Defendants deny that their activities directly affect the flow of entertainment and members of their profession in interstate commerce.

4. Defendants deny the allegations contained in paragraph 4.

5. Defendant American Federation of Musicians admits the allegations contained in paragraph 5 that it maintains a National Defaulters List, published in its monthly publication entitled "International Musician", listing establishments that have defaulted in their contractual ob-

392 ligations with members of the Federation. But it denies the allegation that it excludes from said list defaulting operators, whether they be absconding lessees, bankrupt operators or otherwise. Defendant American Federation of Musicians further denies the allegation that the National Defaulters List constitutes a blacklist of discredited business organizations and management; it asserts that said list is merely an announcement to its members of those establishments and operators who have defaulted in their contractual obligation with Federation members. Defendants further deny the allegation that they make payments to individual members and that they seek to recoup losses therefrom. Defendants Local 710 and Local 161 deny the allegation contained in paragraph 5 that each of them has established and maintains a National Defaulters List.

6. Defendant American Federation of Musicians admits the allegation contained in paragraph 6 that when an establishment is placed on the National Defaulters List no member is permitted to contract for or perform in that establishment until it is removed from said list. But it denies the allegation that the listing is imposed against the establishment and not the defaulting individual irrespective of who the owner or successor lessee might be.

7. Defendants deny the allegations contained in paragraph 7 that the good will of every organization placed on the National Defaulters List consists exclusively or primarily of its ability to accommodate live entertainment. They further deny that they, as a labor organization,

393 are in a position to provide any live entertainment; they assert that musical entertainment is provided solely by individual members

or music brokers and that they, as labor organizations, do not in any way provide or contract for providing musical entertainment. The defendants further assert that any establishment placed on the National Defaulters List is free to secure and contract for musical entertainment by individuals who are not members of the American Federation of Musicians and that they are free to secure and contract for other forms of live entertainment, such as vocalists, acrobats, dancers, jugglers, comics and the like, which are not within the jurisdiction of the American Federation of Musicians. Defendants also deny the allegation contained in paragraph 7 that to operate the Club Bengazi successfully its operator must provide live entertainment for his patrons. They admit the allegation that Club Bengazi is now on the National Defaulters List but deny that it has been on that list at all times since 1946. They deny all other allegations contained in paragraph 7.

8. Defendants admit the allegation contained in paragraph 8 that Paul Mann and Ralph Feldman, former lessees and operators of Club Bengazi, defaulted on their contracts with members of the American Federation of Musicians and that Club Bengazi was placed, for certain periods of time, on the National Defaulters List because of such defaults. But defendants deny that the plaintiffs, as owners of Club Bengazi, are now or ever have been included on the National Defaulters List because of these defaults or for any other reason. They assert that the said Paul Mann and Ralph Feldman operated under the name Club Bengazi and defaulted in their obligations, and for that reason the Club Bengazi was placed on the said list for certain periods of time.

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They further assert that the Club Bengazi was placed on said list at other periods of time because other lessees operating under the name of Club Bengazi also defaulted in their contractual obligations.

9. Defendants deny the allegations contained in paragraph 9 and assert that its National Defaulters List was and is circulated only to members and affiliates of the American Federation of Musicians and not the entire entertainment world.

10. Defendants deny the allegations contained in paragraph 10 and assert that individual members of the American Federation of Musicians did supply musical entertainment to Louis Murray, operating as the Club Bengazi, upon his promise to make monthly payments on past indebtedness incurred by the Club Bengazi.

11. Defendants deny the allegation contained in paragraph 11.

12. Defendants deny the allegations contained in paragraph 12.

13. Defendants deny the allegations contained in paragraph 13.

COUNT TWO

14. Defendants incorporate by reference all their admissions, denials and assertions set forth in answer to paragraphs 1 through 13 with respect to the allegations incorporated in paragraph 14 of the complaint.

15. Defendants deny any allegation contained in paragraph 15 that they have violated Sections 1 and 2 of the Sherman Act or Section 7 of the Clayton Act.

16. Defendants deny the conclusions of law contained in paragraph 16 of the complaint.

17. Defendants deny the allegations contained in paragraph 17 that their acts and conduct constitute a combination and conspiracy in restraint of trade and commerce in the entertainment field among the several

395 states, the monopolizing of a part of such trade and commerce, an attempt to monopolize a part of such trade and commerce, and a combination and a conspiracy to monopolize the same.

18. Defendants deny the allegations contained in paragraph 18 and assert that they have not notified the plaintiffs or their prospective lessees that they will not be permitted to contract with members of the Federation for entertainment services unless past indebtedness of \$3,561.00 is satisfied. They further assert that the sole purpose of the National Defaulters List is to warn Federation members of those establishments and individuals who have defaulted in their contractual obligations and who cannot be trusted with future obligations until past indebtednesses are satisfied.

19. Defendants deny the allegations contained in paragraph 19.

20. Defendants deny the allegations contained in paragraph 20.

21. Defendants deny the allegations contained in paragraph 21.

COUNT THREE

22. Defendants incorporate by reference all their admissions, denials and assertions set forth in answer to paragraphs 1 through 13 with respect to the allegations incorporated in paragraph 22 of the complaint.

23. Defendants incorporate by reference all their admissions, denials and assertions set forth in answer to Count Two of the complaint with respect to allegations incorporated in paragraph 23 of the complaint.

24. Defendant American Federation of Musicians admits the allegation contained in paragraph 24 that it is the publisher of a monthly journal called the "International Musician" which is circulated and read by its members, their families and friends throughout the United States and Canada.

25. Defendants deny the allegations contained in paragraph 25. They assert that the listing of the Club Bengazi in the National Defaulters List has at all relevant times reflected the true facts with respect to the defaults of various operators of, and using the name of, the Club Bengazi and that neither of the plaintiffs has at any time been included on the National Defaulters List.

26. Defendants deny the allegations contained in paragraph 26.

/s/ Henry Kaiser

/s/ Eugene Gressman

VAN ARKEL AND KAISER

* * *

Attorneys for Defendants

[CERTIFICATE OF SERVICE]

[Filed December 23, 1955]

MEMORANDUM

The defendant American Federation of Musicians maintains a National Defaulters List which is published in its monthly publication, "International Musician," and lists establishments that have defaulted in their contractual obligations with members of the Federation. Plaintiff's are the owners of Club Bengazi, located in Washington, D.C. Former lessees and operators of the club defaulted in their obligations, and the club was placed on the National Defaulters List in 1946. It is alleged in the complaint that when an establishment is placed on this list, no member of the union is permitted to contract with or perform in that establishment until it is removed from the list.

The suit against the parent union and its local affiliates is filed in three counts alleging unlawful interference with the right to contract, violation of the anti-trust laws, and libel. Plaintiffs have now moved for summary judgment as to counts two and three, the alleged anti-trust violations and libel. In their turn, defendants have also moved for summary judgment on the same two counts. Oral argument was heard on both motions.

As to the charges in count two of conspiracy, restraint of trade, secondary boycott and illegal coercion, the Court finds that these are basically, almost by definition, factual questions which it would be difficult, if not impossible, to prove as a matter of law. The purpose, operation and effect of the National Defaulters List could not very well be shown except in a trial on the merits. The claims that this listing is coercive and arbitrary and for the purpose of restraining trade may be rebutted by evidence to show that it is a legitimate trade union activity for the purpose of advancing its own interest. ^{1/} The same factual questions await decision in answer to the defendants' motion for summary judgment on this count. The Court, therefore, concludes that both motions for summary judgment on count two should be denied.

1/ Toulmin's Anti-Trust Laws, Vol. 5, pp. 419-422.

In their motion as to count three, plaintiffs contend that being listed in the National Defaulters List is a form of blackmail and is libelous per se. Defendants assert truth as a complete defense to the charge of libel, and in their own motion for summary judgment on count three they state that there can be no libel against the plaintiffs since they are not named or mentioned in any way in connection with the listing of the Club Bengazi. Plaintiffs reply to this by stating that truth is a factual issue for the jury and that even though plaintiffs are not personally listed, the reference to them is obvious since they are the owner of the club.

It seems to the Court that the opposition to each party's motion for summary judgment on this count plainly shows that there are not sufficient facts at this point to determine the question of libel and truth. Both motions for summary judgment as to count three of the complaint will be denied.

Counsel will present a proper order.

/s/ Edward A. Tamm

JUDGE

Dated: 12/23/55

[Filed March 13, 1956]

PRE-TRIAL STATEMENT OF PLAINTIFFS, MORRIS &
DOROTHY JOHNSON

In a three count complaint, Plaintiffs charge each defendant with unlawful interference with the right to contract, anti-trust violations, and libel. In support of these charges, plaintiffs allege that they own the Club Bengazi, 1423-25 U Street, N. W., Washington, D. C.; that they have never been operators of the Club themselves, but have leased the same to several lessees; that during 1947 their lessees, Ralph Feldman and Paul Mann, had failed to pay wages earned by certain members of the defendant union in the Club; that whereupon the defendants

placed the Club Bengazi on its National Defaulters list which is published in their monthly magazine, the "International Musician"; that in order to have the establishment removed from the Defaulter's List, either the owners thereof, or new prospective lessees, must arrange to pay off the defalcations of Feldmann and Mann; that it is the policy of the defendants to hold an establishment liable for such indebtedness to their members even though a new operator may take over after the original default; that when an establishment is placed on the Defaulter's list no union members are permitted to contract for or perform in that establishment until it is removed from the Defaulter's List; that during 1951-2 union members did supply musical services to Louis Murray, a new operator of the Bengazi, upon his promise to make monthly payments to the defendants on past indebtednesses of the establishment at which time the Club Bengazi was temporarily removed from the Defaulter's List; that several new operators refused to make such payments whereupon plaintiffs were unable to lease the Club Bengazi to their financial detriment.

432 Plaintiffs allege that the Club Bengazi has been on the Defaulter's List from 1947 to the time of Pre-trial in this cause, except for the period the Club was operated by Louis Murray; that prospective lessees were warned by the union that the Club was blacklisted; and that union musicians would not be available to them. Therefore, it is plaintiffs theory on count one that this is an unlawful interference with the right of plaintiff to contract for the leasing of their premises, the Club Bengazi.

Plaintiffs contend that the unions method of collection of a debt by circulating the name of the establishment and not permitting union members to contract for services in such blacklisted establishments for the primary purpose of collecting a debt constitutes an unlawful boycott; that such unlawful boycott is not a legitimate union activity as defined by the Norris-Laguardia Act; and that, therefor, it is a violation of the Anti-Trust Laws even though the unlawful boycott does not extend beyond the District of Columbia because the Anti-Trust Laws apply to this District by definition and is by itself in interstate commerce.

Plaintiffs contend that the listing of the Club Bengazi in its Defaulter's List is a form of blacklisting by the defendants and therefore, libelous per se, or otherwise libelous to plaintiffs as alleged in Count three.

SPECIAL DAMAGES: Plaintiff claims the loss of sale of Club Bengazi and its Good Will in the sum of \$35,000.00 and the loss of rental at a rate of \$600.00 monthly, as follows:

1947 -	six months	\$ 3,600.00
1948 -	twelve months	7,200.00
1949 -	twelve months	7,200.00
1950 -	twelve months	7,200.00
1951 -	nine months & remaining less 250.00 mo. on Murray lease	6,150.00
1952 -	twelve months less \$250.00 mo. on Murray lease	4,200.00
1953 -	Three months & remaining less \$250. month Murray lease	4,950.00
1954 -	twelve months	7,200.00
1955 -	twelve months	7,200.00
1956 -	three months	1,800.00
Total loss of rental		\$56,700.00

DOCUMENTARY EVIDENCE: Plaintiffs offer exhibits A, B, C, D, E, and F for identification and initialing by Pre-trial Judge. Plaintiffs are not in possession of any of the publications of the "International Musician" in which the Club Bengazi appears on the National Defaulters List.

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PLAINTIFF'S OFFER THE FOLLOWING FOR STIPULATION:

- a) the admissions contained in paragraphs one, two, three, five, six, seven and eight of each defendants answer;
- b) that each plaintiff jointly owns the Club Bengazi with improvements thereon as well as the land thereunder without the necessity of producing evidence of title to realty or documents of title;

- c) that defendants mailed exhibit F on November 12, 1954 and same was received by plaintiffs in regular course of mail thereafter;
 - d) the authenticity of plaintiff's exhibits A, B, C, D, and E and admission without formal proof subject to reservation by defendants of all objections on grounds of relevancy and competency;
 - e) that the Club Bengazi has been on the National Defaulter's List from approximately July 1, 1947 to date of pre-trial except for the period the Club was operated by Louis Murray;
 - f) That the conduct of defendant in its use of National Defaulter's list is a boycott, but that plaintiff claims it is unlawful whereas each defendant claims that it is lawful;
 - g) that plaintiffs have been damaged in the sum of \$20,000 for loss of good will and \$25,000 for loss of rental, a total of \$45,000.00.
- In addition to above stipulation counsel suggests a joint meeting of counsel for purposes of attaching a joint stipulation of other matters not apparent at pre-trial.

/s/ Edward J. Skeens

Attorney for plaintiff

[SERVICE]

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[Filed March 13, 1956]

DEFENDANTS' PRETRIAL MEMORANDUM

STATEMENT OF FACTS

The defendant, American Federation of Musicians, is an unincorporated labor organization maintaining, among other things, a "National Defaulters List" published in its monthly publication, "International Musician". This list does no more than name persons and establishments that have defaulted in their contractual obligations with members of the American Federation of Musicians. The objective of the "List" is to protect the membership from contracting with known defaulters. The Musicians Protective Association, Local No. 710, and the Musicians Union - District of Columbia Federation -

Local No. 161, are likewise unincorporated labor organizations maintaining offices and doing business in the District of Columbia. Plaintiffs claim to be owners, as tenants by the entireties, of the land and improvements thereon located at 1423-1425 You Street, N. W., in the District of Columbia, and that this property houses a place of entertainment known as Club Bengazi.

This suit is a three count complaint. The first count charges unlawful interference with right to contract. The second count is an action for treble damages under the Sherman Act, and the third count is an action for libel.

All three counts are based on the fact that the Club Bengazi was placed on the National Defaulters List in 1946 and was on the "List" from time to time since that date, and that as a result thereof the plaintiffs were substantially damaged.

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DEFENSES

Count I.

1. Defendant, American Federation of Musicians, does not maintain an office and do business within the District of Columbia.

2. Defendant, American Federation of Musicians, denies

(a) That their membership includes "virtually every type of entertainer such as vocalists, acrobats, dancers, jugglers, comics and the like."

(b) That it dominates and controls the field of entertainment to the virtual exclusion of any other organization in each of the 48 States and the District of Columbia.

(c) That their activities directly affect the flow of entertainment and members of their profession in interstate commerce.

3. The defendants deny that the services of the individual members are guaranteed and paid by the defendants in the event an establishment defaults in payment to an individual member.

4. The defendant, American Federation of Musicians, denies

(a) That it excludes from the National Defaulters List any defaulting operators whether they be absconding lessees, bankrupt

operators or otherwise.

(b) That the National Defaulters List constitutes a blacklist of discredited business organizations and managements.

(c) Defendants deny they make payments to individual members and that they seek to recoup losses therefrom.

(d) Defendants, Local No. 710 and Local No. 161, deny that both or each of them has established and maintains a National Defaulters List.

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5. Defendant, American Federation of Musicians, denies that the National Defaulters List is imposed against the establishment and not the defaulting individual irrespective of who the owner or successive lessee might be.

6. Defendants deny:

(a) That the goodwill of every organization placed on the National Defaulters List consists exclusively or primarily of its ability to accommodate live entertainment.

(b) That they provide or contract for providing musical entertainment.

(c) That Club Bengazi, in order to operate successfully, must provide live entertainment for its patrons.

(d) That Club Bengazi has been on the National Defaulters List at all times since 1946.

(e) That Club Bengazi was a blacklisted establishment and that prospective lessees refused to rent the same for that reason.

7. Defendants deny that the plaintiffs, as owners of Club Bengazi, are now or ever have been included on the National Defaulters List.

8. Defendants deny circulating information to the entertainment world that the Club Bengazi was blacklisted and that plaintiffs were injured in either attempting to lease or sell the premises.

9. Defendants deny:

(a) Furnishing entertainment to one Louis Murray.

(b) Any conduct which interfered with purchase and sale on the 12th day of November, 1948, to one Louis Miller.

10. The defendants deny knowingly or intentionally and without lawful means, without justification or excuse, interfering with existing leases and sales agreements and also interfering with leases about to be executed.

437 11. Defendants deny any course of conduct violative of Title 18, U.S.C.A. Section 1951.

12. Defendants deny responsibility for dissipation of the goodwill of the Club Bengazi, if any, and deny plaintiffs suffered rental loss because of any action of the defendants.

Count II.

1. The defendants incorporate by reference all the denials as to Count I.

2. Defendants deny:

(a) Any violations of Sections 1 and 2 of the Sherman Act or Section 7 of the Clayton Act.

(b) That their acts and conduct constitute a combination and conspiracy in restraint of trade and commerce in the entertainment field among the several States.

3. The defendants deny monopolizing a part of such trade and commerce; attempting to monopolize a part of such trade and commerce; and a combination or conspiracy to monopolize the same.

4. Defendants deny that they have notified the plaintiffs or their prospective lessees that they will not be permitted to contract with members of the Federation for entertainment services unless the past indebtedness of \$3,561.00 is satisfied.

5. Defendants deny that plaintiffs will suffer great and irreparable injury and damages as a result of any action of the defendants.

6. Defendants deny endeavoring to coerce all entertainers throughout the United States by the establishing of a National Defaulters List.

Count III.

Defendants incorporate by reference all their denials set forth to

Counts I and II of this memorandum, and further state:

- 438 1. Defendants deny having falsely, scandalously, defamingly or libelously blacklisted, published, circulated, falsely and wrongfully, any information of and concerning the plaintiffs and Club Bengazi.
2. Defendants deny having published any libel about the plaintiffs or of injuring the plaintiffs in their reputation and goodwill and loss of rentals.

AFFIRMATIVE DEFENSES

Count I.

1. Proof of damages suffered prior to December 20, 1951, is barred by the statute of limitations.
2. The defendants were innocent of any unlawful interference, intentionally without just cause or excuse, with plaintiffs' right of contract.
3. All the activities of the defendants were lawful and proper in nature.
4. The defendants did not at any time knowingly induce or procure a breach of contract entered into by plaintiffs.
5. The action of publishing a National Defaulters List in their own publication by the American Federation of Musicians was privileged and justified.
6. This action is barred by the statute of limitations.

Count II.

1. The defendants are not engaged in any commercial activity or business within the meaning of the Sherman Act.
2. The defendants have not combined with non-labor groups to restrain business activity within the meaning of the Sherman Act.
3. The defendants have not acted in combination with an employer or an employer group to control prices or to suppress competition within the meaning of the Sherman Act.
4. Injunction sought constitutes an unwarranted judicial interference with defendants' enforcement of their own rules concerning discipline of their own members.

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5. This action is barred by the statute of limitations.

Count III.

1. Truth of the publication.
2. Publication in the "International Musician" is a privileged communication within the meaning of the law of libel.
3. Plaintiffs have never been listed in the National Defaulters List.
4. Damages claimed for any period earlier than December 20, 1953, are barred by the statute of limitations.
5. This action is barred by the statute of limitations.

STIPULATIONS

None.

REQUESTS

1. Names and present addresses of all witnesses intended to be called by plaintiffs at the trial of the case.
2. Names and present addresses of all owners, operators and lessees of Club Bengazi from January 1, 1946 to date.
3. Copies of income tax returns of the plaintiffs from 1945 to date.
4. Books and records of plaintiffs from 1945 to date.
5. All leases, contracts and agreements involving Club Bengazi from 1945 to date.

Respectfully submitted,

/s/ Eugene Gressman

/s/ Henry Kaiser

/s/ Hyman Smollar

Attorneys for Defendants

* * *

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[CERTIFICATE OF MAILING]

441

PRETRIAL PROCEEDINGS

[Filed April 9, 1956]

STATEMENT OF NATURE OF CASE:

This is an action for damages based upon the alleged publication in a monthly publication known as THE INTERNATIONAL MUSICIAN of a list by the D. titled NATIONAL DEFAULTERS LIST alleged by P. to contain the names of persons and establishments that have defaulted in their contractual obligations with members of the D. organization. The action is based upon 3 counts: 1st count charging unlawful interference with right to contract; 2d count being an action in which treble damages are claimed under the provisions of the Sherman Act; and the 3d count being an action for libel.

The pretrial statements filed respectively by P & D set forth the nature and character of the action and outline the issues.

Stipulations: 1. It is stipulated that the Feb. 1956 issue of the publication entitled "INTERNATIONAL MUSICIAN" shall be admitted without formal proof, and shall be considered as typical of and in lieu of all issues of said publication from Oct. 1948 to the time of trial so far as concerns the inclusion of Club Bengazi on the National Defaulters List published in such publication.

2. That P's exhibits A to T, as so identified during the taking of each of P's depositions, shall be considered as so marked and identified for the purpose of the pretrial proceedings.

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3. That from the year 1941 to date, inclusive, Ps have been and are owners by the entirety of the real property located at 1423-25 U St. NW in Washington, DC.

4. That P's exhibit F was mailed by the Ds. on Nov. 12, 1954, and same was received by P. in regular course of mail thereafter.

D. is granted 2 weeks time within which to file motions to amend its answer so as to assert the defense of the statute of limitations and also to assert the defense of laches; that D. is granted 2 weeks time to file motion to require Ps to produce their income tax returns for the year 1946 and all subsequent returns to date.

P. eliminates from his claim of special damages as set forth in his P. T. statement the following: total loss of rent \$56,700.00 and inserts in lieu the amount of \$46,500.00, the difference being accounted for by the elimination of the item \$3600.00 in 1947, 10 months rental for 1948, and 2 months rental for 1949.

The Clerk is directed to advance the aforementioned motions for hearings and to postpone the trial of the case until disposition of said motions, and to advance the trial of the case following said disposition of said motions.

Dated April 9, 1956

/s/ Charles F. McLaughlin

REMARKS of Pretrial Justice for consideration of Trial Justice:

Attorneys authorized to act:

/s/ Edward J. Skeens - E. Harold Patterson
Plaintiff

/s/ Hyman Smollar - Eugene Gressman
Defendant

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[Filed May 7, 1956]

ORDER

On consideration of defendants' motion for leave to amend the answers heretofore filed in this cause, the Court being fully advised in the premises, it is

ORDERED, that leave be and it is hereby given defendants to amend their answers to include the additional affirmative defenses of (1) statute of limitations, and (2) laches, and it is further

ORDERED, that the leave hereby given to file an amendment to the answers is without prejudice to plaintiffs' rights to move to strike said amendment.

/s/ Charles McLaughlin
JUDGE

Dated: May 7, 1956

Seen: /s/ Edward J. Skeens
Attorney for Plaintiffs

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[Filed May 7, 1956]

**ORDER TO PRODUCE UNDER RULE 34,
FEDERAL RULES OF CIVIL PROCEDURE**

On consideration of the defendants' motion for an order requiring plaintiffs, each and both of them, to produce and permit the inspection and copying of the plaintiffs Federal and District of Columbia income tax and personal property tax returns for the years 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954 and 1955; the Court being fully advised in the premises and after argument does,

ORDER, that the plaintiffs, each and both of them, produce for inspection and copying their separate and/or joint Federal and District of Columbia income tax returns and personal property tax returns for the years 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954 and 1955. It is further,

ORDERED, that in the event plaintiffs do not have copies of the income tax returns as designated in this order, they shall sign an authorization in proper form to counsel for the defendants permitting counsel to obtain copies of said returns from the Bureau of Internal Revenue and the District Government, and it is further

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ORDERED, that the defendants are enjoined from publishing or disclosing, pendente lite, the information received pursuant to this order.

/s/ Charles McLaughlin
JUDGE

Dated: May 7, 1956.

Seen:

/s/ Edward J. Skeens
Attorney for Plaintiffs

[Filed May 7, 1956]

AMENDMENT TO THE ANSWER

Third Defense

The claim stated in Count One of the complaint and the damages claimed in Count One of the complaint did not accrue within three years before the commencement of this action, and are therefore barred by the provisions of Title 12, Section 201, District of Columbia Code, 1951 Edition.

Fourth Defense

The claim stated in Count Three of the complaint and the damages claimed therein did not accrue within one year before the commencement of this action and is therefore barred by the provisions of Title 12, Section 201, District of Columbia Code, 1951 Edition.

Fifth Defense

Plaintiffs are not entitled to an injunction as requested in Count Two by reason of laches in that plaintiffs waited more than four years after the occurrences complained of before applying for injunctive relief.

Sixth Defense

The claim stated in Count Two as to money damages did not accrue within three years before the commencement of this action and is therefore barred by the provisions of Title 12, Section 201, District of Columbia Code, 1951 Edition.

/s/ Henry Kaiser

/s/ Eugene Gressman

/s/ Hyman Smollar

Attorneys for Defendants

* * *

[CERTIFICATE OF SERVICE]

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[Filed June 25, 1956]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 20th day of June, 1956, before the Court and a jury of good and lawful persons of this district, to wit:

(List of names of jury)

who, after having been duly sworn to well and truly try the issues between Morris Johnson and Dorothy Johnson, plaintiffs and American Federation of Musicians an unincorporated labor organization, Musicians Protective Association - Local #710 an unincorporated labor organization and Musicians Union, District of Columbia Federation - Local #161 an unincorporated labor organization, defendants and after this cause is heard and given to the jury in charge, they upon their oath say this 25th day of June, 1956, that they find for the defendants against said plaintiffs by direction of the Court.

WHEREFORE, it is adjudged that said plaintiffs take nothing by this action, that said defendants go hence without day, be for nothing held. This judgment is entered without costs against any of the parties.

HARRY M. HULL, Clerk,

By direction of

By /s/ Anne W. Lyddane

Judge Burnita Shelton Matthews

Deputy Clerk.

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[Filed July 20, 1956]

NOTICE OF APPEAL

Notice is hereby given this 20th day of July, 1956, that MORRIS JOHNSON & DOROTHY JOHNSON hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 25th day of June, 1956 in favor of each defendant named above against said Morris Johnson & Dorothy Johnson by granting each defendant's motion for a directed verdict at the conclusion of the plaintiff's case.

/s/ Edward J. Skeens
Attorney for Morris Johnson
and Dorothy Johnson

2 EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS

Washington, D.C.,

Wednesday, June 20, 1956.

The above-entitled matter came on for trial before Honorable BURNITA SHELTON MATTHEWS, a judge in the United States District Court, and a jury, at 11:15 a. m.

APPEARANCES:

For the Plaintiffs:

EDWARD JOHN SKEENS, Esq.
E. HAROLD PATTERSON, Esq.

For the Defendants:

HYMAN SMOLLAR, Esq.
EUGENE GRESSMAN, Esq.

OPENING STATEMENT ON BEHALF OF PLAINTIFFS

* * * * *

11 MR. SMOLLAR: May we approach the bench, Your Honor?
(At the bench:)

MR. SMOLLAR: I don't know whether Your Honor entertains motions for a directed verdict at the end of plaintiffs' opening statement, but I wish to make one.

My motion for a directed verdict is as to all the counts, Your Honor. He has stated nothing -- I would like to start with count three -- he has stated nothing with reference to the libel that would indicate that the statements made about the credit of the Club Bengazi are false.

He admits that the Club Bengazi, at the time it was put on the defaulters list, owed money to various musicians and that the action of placing the Club Bengazi on the defaulters list at the time was the truth. And the truth is a complete defense, as Your Honor well knows, to a libel.

* * * * *

14 MR. SMOLLAR: In count two he charges damages for violation of the Sherman and Clayton Acts. He has said nothing which appears to be actionable under either the Sherman Antitrust Act or the Clayton Act. I heard nothing. I don't know of any statement he made on opening statement that could qualify as binding us under the Sherman Antitrust Act and the Clayton Act.

It is a matter of law, Your Honor, that a union can only be found guilty under the Sherman Antitrust Act if it is in conspiracy with an employer group. It has been so held as recently as -- what is the date on the Hutcheson case -- 1946, United States against Hutcheson.

15 THE COURT: What is the citation, or do you have it?

MR. GRESSMAN: I can have it.

MR. SMOLLAR: And there is no allegation made either in opening statement or in the complaint that these defendants were acting in concert with any employer group, and this is an absolute essential if they are going to maintain their case under the Sherman Antitrust Act and the Clayton Act.

THE COURT: You mean there has to be an employer involved?

MR. SMOLLAR: Yes, an employer involved.

So far as the first count is concerned, Your Honor, there has been nothing said in his opening statement which would indicate that these defendants had knowledge, which is another absolute ingredient, of the shift in ownership at any time after the club was placed on the defaulters list. There is absolutely no knowledge; and knowledge is an indispensable criterion and ingredient if they are going to show an unwarranted or unlawful interference with their right of contract.

All they did was say we placed the plaintiffs on the defaulters list. It is not the plaintiffs but the Club Bengazi. There is no evidence that any communication was ever made to this union in Newark that they were or were not on the defaulters list, that there was a change
16 in ownership.

There is nothing in the record at all which would indicate scienter on the part of the defendants, and I submit, Your Honor, that is an absolute indispensable ingredient.

* * * * *

THE COURT: I will take your motion under advisement. We will proceed.

MR. SKEENS: I might say for the record I am relying on the ruling of Judge Tamm, who denied their motion for summary judgment on counts two and three.

THE COURT: He denied it on something else. We are talking now about your opening statement. Is there anything you want to say?

MR. SKEENS: Your Honor, I have alleged all the things he says I didn't allege in my opening statement. There is no doubt about it. I stated this Louis Murray had to make arrangements. He had to fly

17 to Newark to tell them that the club was on the list and he had to get entertainment. I said Ralph Feldman had to go there -- go in there and make arrangements. I stated Middleton wouldn't enter into a lease.

THE COURT: That isn't stating who owned it.

MR. SKEENS: It is taken as proof, Your Honor. My opening statement must be taken in evidence on this type of a motion. This is on the opening statement.

THE COURT: But I mean you didn't state it on your opening statement anything about any change in this, that they knew of these things.

Well, anyway, have you finished?

MR. SKEENS: Yes.

* * * * *

OPENING STATEMENT ON BEHALF OF THE DEFENDANTS

21 MR. SMOLLAR: * * * * This is legitimate. We say and we expect the evidence to show that the courts -- at least one court, the Supreme Court of Florida in --

MR. SKEENS: Just a minute, Your Honor. I object to that.

THE COURT: The objection is sustained.

MR. SKEENS: May we approach the bench, Your Honor?

22 THE COURT: Yes.

(At the bench:)

MR. SKEENS: I guess I will have to move for a mistrial on that basis, Your Honor. I don't think a jury has a right to know what the Supreme Court of any other state has held in this kind of a case, what applies here, or what the facts are, or anything.

MR. SMOLLAR: Mr. Cluzeman who is the secretary of the union is going to testify about the policy of the union, Your Honor, as part of his

testimony. He is going to say that policy is questioned at all times.

THE COURT: What?

MR. SMOLLAR: It is under consideration at all times that when the Supreme Court of Florida said that this activity was legitimate, they continued this policy. Now I have a perfect right to produce that testimony. This was called into question in the case and I expect to prove it by Mr. Cluzeman that when they discussed policy, they were influenced by what the Supreme Court said.

THE COURT: Well, I am sustaining the objection to this remark about the Florida Court.

And I will overrule your motion, Mr. Skeens.

MR. SKEENS: For a mistrial?

THE COURT: Yes.

* * * * *

27 MR. SKEENS: May we approach the bench a moment?

(At the bench:)

MR. SKEENS: For the record, Your Honor, I would like to now state that in view of the fact that Mr. Smollar has made an opening statement on behalf of each defendant at the conclusion of the plaintiffs' opening statement, that he has waived any motion for a judgment on the opening statement made by the plaintiffs and that he has now placed the entire case in issue to the jury.

28 THE COURT: Call your first witness, please.

(In open court:)

MR. SKEENS: Will the Deputy Marshal please call Mr. Bailey?

MR. SMOLLAR: May we approach the bench?

(At the bench:)

MR. SMOLLAR: If Your Honor please, I know it is largely within the discretion of the Court as to who gets called as the first witness. I feel we are being seriously damaged by not having the plaintiff on the stand first.

THE COURT: Just a minute. You are not calling your plaintiff first?

MR. SKEENS: No, Your Honor.

THE COURT: It is usual to call the plaintiff first.

MR. SKEENS: Yes, Your Honor, but that is not necessarily required by the law. The plaintiff has a discretion to try his case in any way.

THE COURT: You mean the Court has a discretion whether or not to allow you to put somebody on beside the plaintiff in the beginning.

MR. SKEENS: Well, Your Honor, the reason why I am putting this witness on is to go back to the beginning. That is the purpose, Your Honor. I am going back to how the union was formed -- the background.

29 This witness was the former president of the Local 710, the defendant here, and we will show the operation of the union leading into the Bengazi as it was taken over in 1942 right up until 1949, as this witness will testify. I think it is in proper sequence with what we intend to prove.

THE COURT: I think you should put your plaintiff on first, as is usual in cases where there are suits of this nature.

MR. SKEENS: All right then, Your Honor wants the plaintiff on first.

THE COURT: Plaintiffs always go on first as a rule in these cases.

MR. SKEENS: I will note an objection if I may, Your Honor.

THE COURT: Certainly.

* * * * *

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MORRIS JOHNSON

was called as a witness on behalf of the Plaintiffs * * *

* * * * *

58

BY MR. PATTERSON:

Q. Did Vaughan Blaine put new fixtures into this basement during the time of his operation?

MR. SMOLLAR: Your Honor, I am going to object to whatever Mr. Vaughan Blaine, who was the lessee and in possession, did at the time.

THE COURT: The objection is sustained as to what Mr. Vaughan Blaine did about fixtures.

* * * * *

59

BY MR. PATTERSON:

Q. What would you say the value of the improvements was, Mr. Johnson?

MR. SMOLLAR: Your Honor, I am objecting to that.

THE COURT: The objection is sustained. I think that you gentlemen ought to get down to what this claim is here.

* * * * *

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THE COURT: Counsel will come to the bench, please.

(At the bench:)

THE COURT: What is all this about?

MR. PATTERSON: Your Honor, we are trying to develop the background of the entire history in order --

THE COURT: I am not so much interested in history until I know something about the question of liability here. We might spend days wandering around on history and then not tie it up in any way with liability.

MR. SKEENS: May I also say, Your Honor, this happened a long time ago and this witness can only remember what happened by documents that are given to him. We are leading up to when Vaughan Blaine left and Paul Mann came in because Paul Mann was the one who defaulted on these wages in 1947.

THE COURT: I think you ought to find on something that has to do with liability.

MR. SKEENS: We know, Your Honor.

THE COURT: You are making a claim for this man here. You are charging libel and you are charging interference with the contract and so on. We are not interested in this ancient history unless it has some bearing on these charges in this case, and you are wandering all over the lot.

62

MR. SKEENS: May I respectfully say, Your Honor, we are claiming loss of rentals and the jury has a right --

THE COURT: There is no use claiming loss of rentals. Anybody can claim loss of rentals but it has to have some basis, and we want the basis.

MR. SKEENS: Well, Your Honor, we won't be able to come back to that story if we go into the thing first.

THE COURT: I think you should go into liability first; I am not going to spend a lot of time here wandering all over the lot about ancient history unless it is tied up with liability.

MR. SKEENS: We will come back to their liability after we fix this liability and then go to damages.

THE COURT: That is what I think you ought to do.

(In open court:)

* * * * *

65 BY MR. PATTERSON:

Q. Mr. Johnson, did there come a time when Paul Mann got into difficulty with the union?

MR. SMOLLAR: Well, Your Honor, he has laid no foundation for this question. I am objecting to it. He is asking him about Paul Mann's difficulty with the union. I assume he means the defendants in this instance.

THE COURT: He has got to have some personal knowledge about what he is testifying.

* * * * *

72 MR. PATTERSON: Your Honor, the only way that we can develop this story is what Mr. Johnson knows. We have not rehearsed this and I will say that we will develop the connection of who exactly Mr. Hill, whom Mr. Johnson refers to, is at a later point in the Plaintiff's testimony.

THE COURT: It is your representation that you expect that you will connect Mr. Hill as an officer of this organization, or what?

MR. PATTERSON: At least that he is an employee and that I believe that he is an officer.

THE COURT: Well, one single employee is not -- just because he is an employee -- authorized to go out and speak for the union.

MR. PATTERSON: If he speaks for his employer he would be, and that is what happened in this case. If you will let us go on and show what happened --

THE COURT: Well, I don't believe you can bind the union by what a member says, if it is a member. He has to have some authorization.

MR. PATTERSON: Your Honor, Mr. Hill was one of the officials, I am sure, of it.

73 THE COURT: Well, now, you say you are sure. Do I understand that you expect to produce evidence to indicate that Mr. Hill was at this time an official of this union?

MR. PATTERSON: I might say, Your Honor, we are not trying to prove our case entirely by Mr. Johnson's testimony. We are trying to show that Mr. Johnson made an effort to do something about his being blacklisted, that he did call --

THE COURT: Well, now, just a minute. If he wants to do something about it, it is all right to do something about it. But if you want to indicate that the union did something, you are going to have to connect the proper persons to show it.

MR. PATTERSON: And that we shall do.

THE COURT: Well, that is what I was asking you.

MR. PATTERSON: But we can't do it through Mr. Johnson entirely because he does not know.

THE COURT: No, but I ask you if you expect to do it through someone else, because if you represent you are going to do it, I will permit him to testify subject to your doing it. If you don't do it, then I will strike it.

MR. PATTERSON: That is correct, Your Honor.

MR. SMOLLAR: As I understand it, Your Honor, he is offering to prove at some later date that this Mr. Hill was an official of the union, a responsible official for the union, who had the right to speak for the union?

THE COURT: Well, that is what I understand. Is that correct?

74 MR. PATTERSON: All that I say is that when Mr. Johnson contacted the Local 710, he spoke to one Mr. Hill who led Mr. Johnson to believe that he was an official, and we will connect --

THE COURT: Well, somebody, who had no connection with the union at all, might go to him and say that they represented the union. That wouldn't make it so.

MR. SKEENS: Your Honor, if I might help a little, I think Mr. Bailey, former president of the Local 710, will testify that Mr. Hill was an official at Local 710.

THE COURT: Subject to your connecting that, you may ask him a question.

* * * * *

78

BY MR. PATTERSON:

Q. Mr. Johnson, would you examine it more carefully and answer the question again, please? A. Jean Feldman and Paul Mann -- this is a lease that was signed by Jean Feldman and Paul Mann.

THE COURT: Isn't it an agreement to sell a business, Mr. Johnson?

THE WITNESS: Yes, contract for sale, contract for sale.

BY MR. PATTERSON:

Q. Does your signature appear thereon? A. Yes, it does.

Q. Who else's signature appears on that paper?

MR. SMOLLAR: Your Honor, I think I can shorten this. The original of that lease appears to be in the court files in the case of Feldman against Johnson, and the number is 4704-49. I have a photostatic copy of it, which I ordered from the clerk downstairs.

* * * * *

84

BY MR. PATTERSON:

Q. Mr. Johnson, I show you a paper, which is marked Plaintiffs' Exhibit Number 9 for identification, and I ask you to identify it. A. This is a check that I made to Mr. Herman Miller for preparing --

MR. SMOLLAR: Just a minute. I object to him telling any more than what it is if he is identifying it. Any recitation as to the purpose of it, I object to.

THE COURT: You have answered the question.

* * * * *

85 Q. What was the purpose of that check?

MR. SMOLLAR: That is objected to, if Your Honor please.

THE COURT: What is that?

MR. SMOLLAR: I am objecting to it.

THE COURT: The objection is sustained.

MR. PATTERSON: Your Honor, I offer Plaintiffs' Exhibit Number 9 in evidence.

MR. SMOLLAR: I object.

THE COURT: The objection is sustained.

* * * * *

91 Q. When did you first talk to Mr. Murray? I show you Plaintiffs' Exhibit Number 12 to refresh your memory, Mr. Johnson. A. In 1951.

Q. Mr. Johnson, would you please tell the Court and jury the circumstances of the negotiating of this lease?

MR. SMOLLAR: Your Honor, I object to it. The lease speaks for itself.

MR. PATTERSON: Your Honor, I am interrogating the witness not as to the terms of the lease, but as to the circumstances from which the lease evolved.

92 THE COURT: Whatever the circumstances were, they finally culminated in the lease.

MR. PATTERSON: They also culminate in other things which we want for background.

THE COURT: I think you better come to the bench.

(At the bench:)

MR. SKEENS: May I say, Your Honor, there is a whole series of transactions here between Murray and Johnson, the Plaintiff. The testimony will show that Murray did not know the club was on the defaulters list until after he went in. When he found out, he found he could not operate the business; that he had difficult finding --

THE COURT: Do you know that you are charging these unions interfered with the contract that was entered into? Why don't you get down to business?

MR. SKEENS: That is what we are doing.

THE COURT: What the interference is?

MR. SKEENS: This is it right now. We are showing that Murray had to fly to New York to make arrangements to get the club off the list so he could actually operate the club. This man signed a lease and couldn't operate it.

THE COURT: You mean to tell me that just because these musicians that belong to the federation were not going to operate for him, that he couldn't operate this club?

MR. SKEENS: That is right.

93

THE COURT: There are plenty of clubs that operate --

MR. SKEENS: We have testimony that will show this club could not operate without union musicians. Your Honor, we have a lot of witnesses in this case; we have a lot of proof and we can only take one step at a time. We can't jump right into --

THE COURT: Just exactly what is it you are calling for by this question?

Just a moment. Mr. Reporter will you read the question.

(Question was read by the reporter.)

Now, what is it you are calling for?

MR. SKEENS: I think we can alleviate that by rephrasing it to ask him while they were negotiating the lease, did they enter into conversation as to the Bengazi being on the defaulters list; and then to that this witness will say no.

And then we will have conversations as to Murray contacting the plaintiff and asking him why they didn't explain he was on the list. It was not until after he leased the place when he found out he couldn't open it. And Murray asked, "What am I going to do? I gave you so much money as a down payment --"

THE COURT: Well, what has this got to do with these defendants?

MR. SKEENS: Well, Your Honor, they are the ones preventing the union musicians --

94

THE COURT: You should connect them in some way.

MR. SKEENS: Your Honor, won't you let me put on my first witness? This witness can't give us everything about the union; I have other witnesses to prove that.

MR. PATTERSON: Mr. Johnson was only the landlord.

MR. SKEENS: He was only the landlord; he doesn't know what the union was doing.

THE COURT: There is certainly a whole lot of testimony going in here that does not seem related in any way to anything.

MR. SKEENS: We are going to bring in some of these lessees that had negotiations with the union directly. Mr. Johnson's negotiations with the union were very negligible at the beginning until later on in 1954, which we are coming to. Right now, we are in 1948.

THE COURT: Would it be accurate to say that that is the particular and specific interference that you are claiming, merely that they were on this list; is that it?

MR. SKEENS: No, that is just the beginning.

THE COURT: What is it?

MR. SKEENS: It is that the union puts a club on the list regardless of to whom the default goes. There is an operator here and he knows nothing about why they put the club on the list. Now, the club can't operate without union members. It just won't open and nobody will come in there. They won't get any business. They can't operate. This club showed they were getting musicians coming in and getting a thousand dollars a week. They were getting tremendous salaries.

The place was jammed all the time. As soon as union musicians go out, the place is empty. And as soon as they go out, they can't operate and the union prevents union members from going in there. Now that is only one thing.

Not only do they prevent them from going in there when he attempts to get a new man to come in and lease this place, they come up to him and say --

THE COURT: What did the union do to prevent them from going there? Was it this business of putting on this list somebody that has not paid?

MR. SKEENS: They say a union member can't come in there and play unless you pay off this bill that somebody else owes, or can't even patronize it.

* * * * *

96 MR. SMOLLAR: I don't think he has any right to anticipate how far I am going on cross examination. In my discovery under Rule 26, I went into the whole story to see what his case was. I expect only to stay within the material elements of the case, the material issues of the case.

I never thought all along that he had a case. Now, I want to see him prove it in accordance with the rules. I think the question was objectionable because it was not germane to any issue in this case. If they have something to say by way of producing Louis Murray, they can wait for Louis Murray to get on the stand and produce that testimony.

THE COURT: Is this a conversation with Louis Murray?

MR. SKEENS: Yes, Your Honor, and it is admissible because Murray is going to be called as a witness.

THE COURT: On what theory do you say it is admissible?

MR. SKEENS: As an exception to the hearsay rule because defense counsel will have an opportunity to cross examine the two persons who had this conversation.

THE COURT: That doesn't make it an exception.

97 MR. SKEENS: It is an exception. I have Wigmore right here.

THE COURT: On what theory, which exception? There are thirteen exceptions. Which one is it you are claiming?

MR. SKEENS: Here is the reason why it is not admissible.

THE COURT: It is not admissible? You want to get it in but it is not admissible; is that it?

MR. SKEENS: Wait a minute. The reason why it is not admissible --

THE COURT: I do not want to know why it is not admissible; I want to know what exception as to the hearsay rule you are relying upon.

MR. SKEENS: It is impossible for me to give Your Honor this exception until I give you the reason why it is not admissible at first, that is, Mr. Smollar can not cross examine the person who had the conversation

with him and therefore it is not admissible. But we have established that Mr. Murray is going to be here in court to testify, which gives him the opportunity to cross examine the person who had this conversation with the plaintiff and therefore that --

THE COURT: Is that admissible? I do not know of any exception to the hearsay rule --

MR. SKEENS: I will be glad to provide that for Your Honor after the luncheon recess.

98 Any conversation that the plaintiff has had with any person connected with this case, and it is established that the witness has been subpoenaed and is going to testify as to the substance of this conversation, elements --

THE COURT: A person who is cross examining witnesses has a right to ask a witness about conversations he has had that contradict what he said on the stand. But here you want two men -- at which no union representative was present -- and you want to tell what their conversation was.

MR. SKEENS: Exactly. This man has a right to show --

THE COURT: And then when I ask what exception as to the hearsay rule it is that you are applying, you respond that Mr. Louis Murray will be available for cross examination.

MR. SKEENS: Right. Your Honor has ruled, is that it, we can't go into what conversations --

THE COURT: What is your objection?

MR. SMOLLAR: That it is hearsay, Your Honor. That it is hearsay for him to testify about a conversation he had with a lessee of the Club Bengazi. We know nothing about it, so it is outside of our presence. I don't understand how it would be admissible, under what theory, what rule. If they want to bring Murray in to talk about his --

THE COURT: Anything that anybody says to a union official, you could put in. If Louis Murray then went and talked to a union official, or whoever it was, you can put it in. But to say you can just bring in

99 any conversations that anybody has had out of the presence of these defendants --

MR. SKEENS: All right, Your Honor has ruled. I respectfully take an exception to it.

Now, secondly, I say it is also admissible under the res gestae to show these are circumstances here that arise to bring this entire thing in focus before this jury. It all comes into the res gestae. I base its admissibility under that doctrine. However, Your Honor has ruled.

The second point is this man had a dealing with a man who leased the premises and was attempting to run it, but was interfered with by the union.

THE COURT: All right, you prove it and you get those conversations. That is what you should do instead of trying to show a lot of hearsay. What you ought to do is to pin it down to the union officials.

MR. SKEENS: We will put the lease in and prove it by the other witnesses.

THE COURT: If he has had any conversation with the union official, he can tell it. That is what we want to know. You are charging interference. That is what we want to show.

MR. SKEENS: Of course, when Murray makes complaints to the plaintiff that the union is interfering with his operation --

THE COURT: Is Mr. Murray available?

100 MR. SKEENS: Yes.

THE COURT: Let him tell about it.

MR. SKEENS: All right, Your Honor.

THE COURT: If the union made complaints to him, he can tell about them.

MR. SKEENS: All right.

MR. PATTERSON: In that event, Your Honor, then our case is just with Mr. Johnson to show this development of the entire situation and develop our facts, which is what we started out to do.

THE COURT: You can not develop your facts by hearsay.

MR. PATTERSON: No.

THE COURT: That is what this is.

MR. PATTERSON: But this has come about as a result of --

MR. SKEENS: We will just show this lease and the value of having --

THE COURT: I am not trying to tell you how to show this; I am simply saying that you can not show it by hearsay.

* * * * *

104 BY MR. PATTERSON:

Q. Mr. Johnson, why did Mr. Brown only stay one month?

MR. SMOLLAR: I object to that. It is highly improper. Any reason why Mr. Brown didn't stay should come from Mr. Brown.

THE COURT: I think it calls for a conclusion.

* * * * *

106 Q. Where is the original to that lease, Mr. Johnson? A. This lease? I don't quite understand, this lease.

THE COURT: He was asking you where the original is, if you know.

THE WITNESS: I don't know.

MR. PATTERSON: Thank you.

MR. SMOLLAR: May I see that?

MR. SKEENS: Your Honor, we are not offering it. I don't think counsel has the right to inspect a paper that has only been identified.

THE COURT: Well, you handed it to the witness and asked him to identify it and he said what it was, so let Mr. Smollar see it.

107 MR. SKEENS: My observation is, Your Honor, that counsel can't make any objection at this point so he doesn't have the privilege of examining it.

THE COURT: Well, when you undertake to have the witness speak and say things about a document, the Court is going to rule that the other side has a right to look at it even though you are not formally offering it at this time.

* * * * *

108 (At the bench:)

THE COURT: Let us see this Number 14, for identification. Is that the one that somebody signed?

MR. SKEENS: It is a copy without a signature, Your Honor.

THE COURT: You are asking about \$25.

MR. PATTERSON: Yes.

THE COURT: What is that to elicit?

MR. PATTERSON: We do not have the original; apparently it is lost. We are trying to show --

THE COURT: I was asking about the \$25. You are trying --

MR. PATTERSON: We are trying to show by bringing the \$25 --

THE COURT: Not so loud.

MR. PATTERSON: -- into evidence that this is a bona fide negotiation; that the \$25 was paid as a counsel fee by Mr. Lorenzo Middleton, through Mr. Johnson, to draw this lease.

MR. SMOLLAR: Don't you think that Mr. Middleton would be the only one that could testify about what he paid to Johnson?

THE COURT: Have you not any instrument or document or anything bearing on that?

109 MR. PATTERSON: You mean the check, Your Honor?

THE COURT: Yes.

MR. SKEENS: It was cash.

THE COURT: Do you want to ask him if Mr. Middleton paid?

MR. PATTERSON: That is what I did ask him, I believe.

MR. SKEENS: He has already testified he received \$25 from Mr. Middleton. He asked for what purpose.

MR. SMOLLAR: He said, why. That would call for an answer. That would be a purely self-serving conclusion.

MR. SKEENS: That is not a sound ground for an objection, Your Honor, certainly not within the hearsay rule or anything.

THE COURT: Well, all of these transactions are outside the presence of any of these defendants.

MR. SKEENS: It is all within the res gestae, Your Honor.

THE COURT: The res gestae?

MR. SKEENS: We will have Mr. Middleton here at that time. We will withdraw the question, Your Honor.

(In open court:)

* * * * *

BY MR. PATTERSON:

Q. Who is Bennie Caldwell to whom you referred? A. Bennie

Caldwell is a night club operator that opened or ran two night clubs in the city.

Q. And did he give a reason for not leasing the club?

MR. SMOLLAR: That is objected to, Your Honor. It is hearsay.

THE COURT: Will counsel come to the bench.

(At the bench:)

THE COURT: I think you are treading on dangerous ground.

MR. SKEENS: I am familiar with Mr. Caldwell's background.

126 THE COURT: All right. If you are familiar, you better tell him about it before he goes into too much examination. It is all right with me.

(In open court:)

MR. SMOLLAR: Did Your Honor overrule my objection to the question?

THE COURT: Yes.

BY MR. PATTERSON:

Q. Mr. Johnson, will you please address yourself to the question?

THE COURT: Will the reporter read the question, please.

(The question was read by the reporter.)

THE COURT: I am going to sustain the objection to that.

* * * * *

130 MR. SMOLLAR: Your Honor, I am going to object at this time to this whole line of questioning on the ground it is not relative to any issue based in this case.

THE COURT: The objection is sustained. This is a way after the date of the filing of this complaint.

MR. SKEENS: Is that right?

MR. PATTERSON: Your Honor, our complaint alleges damages up until the time of the pretrial.

THE COURT: You are going to have to show some interference.

MR. SKEENS: May it please the Court, the pretrial order makes a claim for damages right up until the time of pretrial, which supplements the original complaint. And the showing here is or will be made that the

defendant is on the defaulters list at the present time, even at the time of trial. Connecting up all of these circumstances, the defaulters list and the activities of the union are preventing this club from operating in the manner in which it was originally intended to be run.

131 THE COURT: What is the provision in the pretrial order that you are directing my attention to? What paragraph please?

MR. SKEENS: In the next to the last paragraph, where we show the total loss of rentals.

THE COURT: The objection is sustained.

MR. SKEENS: That is in conjunction with my pretrial statement which outlines the rentals for each month, and it runs into 1956, Your Honor, right in the plaintiffs' pretrial statement.

BY MR. PATTERSON:

Q. Now, Mr. Johnson, are you familiar with Buck Hill's Band?

A. Yes, I am.

Q. Who is the one named Buck Hill? A. Well, he is a well-known musician around town, a well-known musician in Washington and he has a band.

MR. SKEENS: Your Honor, to save time, this is also a 1956 issue. I presume Your Honor's ruling will apply to this also.

THE COURT: Yes.

MR. SKEENS: We won't pursue it on the basis of Your Honor's ruling.

THE COURT: Very well.

137 MR. SKEENS: Question six,

"6. How, when and by whom was the policy of the A. F. of M. created to the effect that an establishment is liable for indebtedness to its members regardless of the fact that a new operator of the defaulting establishment may take over after the original default?" Answer 6,

"6. The question is so phrased as not to reflect the accurate facts as to the policy involving the National Defaulters List. All the bylaw provisions of the American Federation of Musicians

are determined and enacted by the annual conventions of the Federation. See Article 28, Sections 19 and 20, of Federation's bylaws. Many years ago the convention adopted Article 10, Section 3, providing that

'If the Federation or a local ascertains that an organization, establishment, person or persons has defaulted in payment to any member or members of the Federation, they may place such organization, establishment, person or persons on the defaulter list.'

138

"The International Executive Board has the power and duty to interpret and apply the Federation's bylaws and to supplement them by adopting rules and policies not covered by the bylaws. See Article 1, Sections 5-B, 5-C and 5-D. The current policy concerning the National Defaulters List, which is not accurately stated in interrogatory Number 6, grows out of the quote bylaw and the interpretation and application given that bylaw over the years by the International Executive Board."

* * * * *

140

THE COURT: I have read this pretrial statement that you prepared, the one that is not signed by the judge, and I see you have made this claim in here through 1956, so you may ask these questions which you put a while ago subject to connecting up.

MR. SKEENS: Yes, Your Honor.

MR. SMOLLAR: If Your Honor please, my objection when it was not to the question of the proof of damage, which I think they did claim. He claimed damages. My objection goes to the proof of an unlawful interference.

THE COURT: I realize that and that is the reason that I said that this would be admitted subject to it being connected up. If it is not connected up later, then it will be stricken.

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* * * * *

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THE COURT: In this question, he asked: "How much money, to whom, and for what reason was Louis Murray required to make payments in order to obtain union musicians as entertainers at the Club Bengazi?"

Now, what is your objection to this answer?

MR. SMOLLAR: My objection, Your Honor, is to the question at this point.

THE COURT: To the question?

MR. SMOLLAR: To the question. The question refers to the problem of Louis Murray, not a party to this case, with the union which is separate and apart from any issue you raised by the pleadings here. In the pleadings, as far as Murray is concerned, they have charged that because of the activity of the defendant unions, they could only get \$250 a month on the lease from Murray when he negotiated the lease. Thus far, they have not shown any evidence which would show, or even pretend to show, that that is the case. Now they attempt by the question -- and we can challenge its relevancy now -- to ask what the problem was that Louis Murray had with the union, which didn't affect this plaintiff at all. How does it affect this plaintiff?

THE COURT: What are you claiming about Mr. Murray?

MR. SKEENS: Your Honor, he was one of the individuals with whom this union interfered. Of course, that will be shown when he testifies.

THE COURT: He is not a plaintiff here.

MR. SKEENS: Sure he is not a plaintiff, but he negotiated the lease with the owner who is the plaintiff, and the plaintiff is claiming damages from union interference, and here is one of the lessees with whom he interfered, which directly affects our client who is a lessor.

THE COURT: You are claiming that the defendants interfered with the lessee; is that what you claim?

MR. SKEENS: Sure.

THE COURT: And that the lessee gave up the lease for that reason?

MR. SKEENS: Not in that instance.

THE COURT: Well, what has it got to do with it?

MR. SKEENS: To show that he only got \$250 instead of \$500 or \$600, which is what it was worth.

MR. SMOLLAR: There is no evidence here, Your Honor, that he got \$250 from Murray.

144 MR. SKEENS: Counsel here does not want us to bring in our evidence. They do not want us to prove our case.

THE COURT: I wish you would. We are waiting a long time for it.

MR. SKEENS: You can only do it one witness at a time, Your Honor.

MR. SMOLLAR: I would like to state for the record --

THE COURT: I wish you would state for the record what your point is now about this.

* * * * *

145 THE COURT: You say the plaintiff successfully obtained a two-year lease for the Club Bengazi during the period in question from Louis Murray, but plaintiffs were required to reduce rentals monthly to less than one-half.

Well, now, what has that got to do with this other than you are claiming that these people were responsible for the other because they had this listing; is that it?

MR. SKEENS: Yes, not only that, but, too, this shows the union's direct interference with the lessee of the plaintiff, direct interference.

THE COURT: It was not direct interference. This man comes up and he goes to them, doesn't he? They do not come to him.

MR. SKEENS: But the plaintiff has been affected by it for eight years.

THE COURT: I do not think this has a thing to do with what Mr. Murray did. It is what the union did with respect to your man.

You are not claiming that they interfered with any contract that this fellow had with them, are you?

MR. SKEENS: The lease between Murray and Johnson, and not only--

MR. SMOLLAR: He is talking about an occurrence after the lease, Your Honor.

MR. SKEENS: Not only that, but we have two other counts here we are trying to bring in evidence on, the antitrust and libel actions. He is only talking about interfering by the union. We have three counts we are trying to enter at once. He is making his objection on count one.

147 THE COURT: Do you think you have a case on this antitrust?

MR. SKEENS: There is no question in my mind, Your Honor.

THE COURT: We will take a five minute recess.

MR. SKEENS: Your Honor, I will read a case in the District of Columbia--

THE COURT: I read a good many cases and I don't think that is in this case at all.

* * * * *

WILLIAM HENRY BAILEY

was called as a witness on behalf of the Plaintiffs * * *

DIRECT EXAMINATION

* * * * *

151 Q. Incidentally, sir, was there a Mr. Hill working at the headquarters there at 710? A. He was a member of the board of directors for many years.

* * * * *

152 Q. When did that come into operation in your Local? A. Well, now, let me see. We had a method of ear-marking people who didn't pay their debts to musicians. I think it was first called the black list. It changed then to the unfair list, and then it changed to the defaulters list.

* * * * *

163 BY MR. SKEENS:

Q. Do you know yourself from the way the Bengazi was run, from the way you were there negotiating these contracts, and the people, the attendance that you referred to, and the contracts that you have negotiated; can you tell the jury here today honestly and truly whether or not the Bengazi could operate without nonunion musicians?

MR. SMOLLAR: Your Honor --

THE WITNESS: What do you mean by the word, "negotiation?"

164 MR. SMOLLAR: -- the first objection I have is that this witness has been sworn to tell the truth and I don't think he has to be admonished to answer questions honestly and truly.

MR. SKEENS: I object to that comment. I think it should be made at the bench because it is personal aspersion of their counsel. I certainly am not admonishing any witness on the stand.

THE COURT: You did say honestly and truly and so forth and so on about telling the truth. He has been sworn to tell the truth.

MR. SKEENS: He is telling the truth. I have no doubt about it, Your Honor. But I don't think counsel should make that statement in open court. I think it is improper.

THE COURT: You made yours in open court, you see, in putting the question to him.

Let's see if he can understand the question. Will you read the question now to the witness. Now, you listen to the question and see if you can understand it.

(Pending question was read by the reporter.)

MR. SMOLLAR: Your Honor, I defy anybody to answer that question, and I am objecting to it for that reason.

THE COURT: The objection is sustained as to the form of the question.

* * * * *

167 BY MR. SKEENS:

Q. Now, then, sir, did you ever have an occasion to discuss with anyone either at the local or the national office about the problem of getting the real person who was indebted to the wage earner, to the musician; in other words, the hidden partner? Did you ever have a discussion concerning that problem of collecting those wages from the real person
168 operating in a club?

MR. SMOLLAR: I am objecting to that question on a number of grounds and one is to the form of the question. It is another question that is difficult to comprehend. Two, there is no evidence in this case that Mr. Bailey, the witness, set the policy on the national level.

Three, he is concerned himself with this union up until 1949, a period long before the period we are interested in here in this case.

The suit was filed in 1954 and we claim the statute of limitations bars any activity or any claim for activity prior to 1951.

And for all of those reasons I am objecting to that question.

MR. SKEENS: I must object to any defenses that are stated publicly in the presence of the jury. I think that is highly improper, first; and, secondly, I am merely laying a foundation to a question that I intend to ask this witness as to what he did about putting a building on a defaulters list. And that is why I did it and I am laying the foundation for that purpose.

* * * * *

169 THE COURT: The objection to the question is sustained. Your questions are quite leading. You have called this witness.

* * * * *

172 Q. Now, what happens to the union member if he goes in and makes a contract with an organization like the Club Bengazi on the defaulters list?

MR. SMOLLAR: That is objected to, Your Honor, as being purely speculative.

THE COURT: The objection is sustained. What happens depends upon each circumstance. You are entitled to show their rules and the regulations, or whatever they are, but he is not able to say what happens in every case.

MR. SKEENS: Yes, but it strengthens his credibility as a witness when he will testify in conformity to what the rules are now.

THE COURT: You don't have to challenge his credibility. You have called him.

* * * * *

174 Q. Now, then, sir, Mr. Bailey, when Mr. Feldman came to you and asked you about these arrangements, did you have any kind of a credit report run on Mr. Feldman to determine his ability to pay the union members ? A. No, sir.

Q. Well, was it the policy of the union at that time to make any credit report on the lessees operating? A. Not during the tenure of my office, I never.

Q. You never did? A. No, sir.

Q. Now, sir, during your tenure as president, there were occasions when organizations would make arrangements to pay off this indebtedness to you; isn't that correct? A. I think that has been done.

175 Q. And they would give you money and that would be for somebody who had played in there in one of the stablishments, and that was for somebody who had money coming to them; isn't that correct?

MR. SMOLLAR: Just, a moment, Mr. Bailey. I am objecting to the testimony of Mr. Skeens. This is his witness he has called. He is not asking him anything in the form of a question. He is testifying for him and leading, and I object.

THE COURT: The objection is sustained.

MR. SKEENS: Yes, Your Honor, that did appear to be leading. I am sorry.

* * * * *

177 BY MR. SKEENS:

Q. All right, sir, is there any circumstance that you can recall where you had to transmit money that came into your office that you transmitted to the national office, in which a percentage was deducted by your office?

MR. SMOLLAR: Your Honor, I just don't understand this kind of fishing expedition. He is talking now generally about some time when he might get money and he would transfer something to New York with no reference to any particular instance, and I think the question is objectionable as to form and relevancy.

THE COURT: The objection is sustained.

BY MR. SKEENS:

Q. Now, sir, you remember establishments in the District of Columbia, during your tenure as president, named the Colonnade, the Brown Derby and the Cimmaron; don't you? A. Yes, sir.

Q. And they were on the defaulters list while you were the president?

MR. SMOLLAR: Your Honor, I am going to object to that line of questioning. I don't see what bearing it has on this case. We are only concerned with one club.

MR. SKEENS: May we approach the bench, Your Honor?

THE COURT: Yes.

178

(At the bench:)

MR. SKEENS: By this testimony, Your Honor, we propose to show that the union is engaged in illegitimate union activity, to wit, acting as a collection agency; that they undertake to collect --

THE COURT: I don't think that is illegitimate to undertake to collect something owing to their members.

MR. SKEENS: I have law that says it is. This Wagshal case right here in the District of Columbia. The Court of Appeals says that if they got a \$17.00 claim, which they had against Mr. Wagshal, they should have taken it to the Municipal Court and not put on an unlawful boycott preventing Wagshal from selling a loaf of bread.

THE COURT: I don't believe these employees that come from all over the country have to run around that way.

MR. SKEENS: Certainly they don't. That doesn't make this legitimate activity. That is the whole of our case, Your Honor. I think we are entitled to put the evidence in for the Court of Appeals, even if Your Honor disagrees with it.

* * * * *

179

MR. SKEENS: I rely on two cases; specifically, Bakery Sales Drivers Local Union Number 33, et al., versus Wagshal, and that is reported in 82 U.S. Appeals, D.C. 138, decided April 28, 1947.

And the second case I rely on to show that this activity is illegal and subject to the Norris-LaGuardia Act is the American Federation of Musicians versus Stein, reported in 213 Fed 2d 679, certiorari denied. It is by the Sixth Circuit Court of Appeals, decided June 16, 1954.

In that case, Your Honor, there was a booking agent placed on the unfair list, and because he asserted his claim to the union and they didn't act fast enough, he filed suit against the union musicians. They put him on the unfair list and he filed to get an injunction against the union for putting him on the unfair list, which they put him out of business. And the Court of Appeals in that Circuit gave him an injunction and said that that was not a legitimate act.

THE COURT: I don't see what this has to do with this plaintiff in this case.

* * * * *

180

(At the bench:)

MR. SKEENS: In view of Your Honor's ruling, counsel for plaintiffs would like to make the following proffer and then he will conclude his direct testimony of the present witness.

THE COURT: You want to ask him what he collected for Colonnade, Brown Derby and Bradshaw; is that what you want to ask?

MR. SKEENS: Yes, Your Honor.

THE COURT: I don't think these cases that you cite have anything to do with the issue. I am going to let you ask the question. I will overrule the objection.

(In open court:)

MR. SKEENS: Will you read the pending question?

(Pending question was read by the reporter, as follows:)

"Q. And they were on the defaulters list while you were the president?"

THE COURT: Can you remember whether they were or not, the Colonnade, the Brown Derby, and what, the Bradshaw?

MR. SKEENS: The Brown Derby, Colonnade, and the Cimarron, Your Honor.

THE WITNESS: I do remember the Colonnade having been on the defaulters list. I don't know about the others.

THE COURT: Put your next question, please.

* * * * *

181 Q. And was there a percentage deducted by your local office for the handling of the collection? A. No, not by the local office, no.

Q. Now, then, sir, I am going to ask you if you recall talking to me yesterday about this case. Do you remember telling me that your office --

THE COURT: Just a moment. You are trying to impeach your own witness.

MR. SKEENS: I am going to announce surprise to that one question.

THE COURT: You had better come to the bench, then.

(At the bench:)

THE COURT: Now, what is this claim of surprise based on?

* * * * *

182 MR. SKEENS: Yes, and I announce surprise.

THE COURT: All right, you can ask him if he told you.

* * * * *

186 MR. SKEENS: Just a moment, Mr. Witness. I object to any questions that go beyond the scope of my direct examination, Your Honor, and there is nothing about a travel tax involved in my direct.

THE COURT: I don't remember anything about any travel tax. The objection is sustained.

MR. SMOLLAR: Very well, Your Honor.

* * * * *

188 Q. What is the custom, Mr. Bailey, so far as contracting with bands or union members; is the contracting done by or through brokers, or is it done by the union? A. Through brokers licensed --

MR. SKEENS: Just a moment, Mr. Witness. I am objecting to any custom that was used by the union while Mr. Bailey was in tenure, because of the same reason that my custom was not permitted into evidence when I tried to show their policy.

THE COURT: This has already been shown by somebody. I have forgotten now whether it was by this witness or some other, but this is already in evidence.

* * * * *

191 Q. I am sorry. Can a new manager going into an establishment that is on the defaulters list come into the office and make a promise to pay off that old indebtedness, and in that fashion get union musicians?

192 MR. SMOLLAR: Your Honor, I am objecting to that question. It is a hypothetical question. It is purely speculative, and there is nothing in this case that would support such a question.

* * * * *

THE COURT: Yes. You may answer.

193 THE WITNESS: If a place was placed on the defaulters list and the new operator, we will say, was coming in to operate the place, then he would be informed as to the status of the place, so far as the defaulters list is concerned, and he would be advised what he had to do probably to have it lifted.

Q. Then what would happen, sir? A. Then we would inform him what had to be done. He would take it up with the national office if he wanted, or he could take it up with the local office. If we are instructed, we would carry out the instructions.

Q. Suppose he would say that he wasn't responsible for the old bill and that if he could show in good faith that he wasn't responsible for that bill, would that reinstate the establishment where he sought to operate it?

MR. SMOLLAR: That is objected to.

THE COURT: The objection is sustained. This is redirect, and he hasn't asked anything about that on his cross examination. You are supposed to have covered this on your direct.

MR. SKEENS: I submit respectfully, Your Honor, that Mr. Smollar has opened the door when he went into the custom that was used in this vicinity while this witness had been president of the union, in effect the conditions of employment for union members, and in effect that --

194 THE COURT: The conditions of employment haven't anything to do with these conditions that he inquired about. He didn't cover this matter you are now inquiring about. You are reopening your original inquiry.

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197

MR. SKEENS: May we approach the bench, Your Honor?

THE COURT: Yes.

(At the bench:)

MR. SKEENS: At this time, Your Honor, since we do have this time lapse I would like to make a proffer for the record in order that it may be complete, and that is with reference to the testimony of the plaintiff, Morris Johnson.

I think the record should accurately reflect that if Mr. Johnson were allowed to testify concerning the circumstances of the leases that he had identified, that circumstances would show the amounts that they had agreed on with each specific lessee, the terms of each lease, and the negotiations --

THE COURT: The terms and the negotiations.

MR. SKEENS: -- leading up to the execution of the leases; and would also show the discussions fixing the price to be paid for the fixtures, assets, and goodwill of the club.

And it would further show that these fixtures and assets and goodwill all insured to his possession and legal title by virtue of a municipal court judgment against Paul Mann.

It would further show that he had received certain sums of money from some of these lessees, and it would also show that he was informed by at least two or three of these prospective lessees that the reason they
198 were not entering into any lease or would refuse to sign a prepared lease was because of the fact that the union had advised the prospective lessees that the Club Bengazi was on the defaulters list, and that union musicians would not be available to them.

He would further testify that he made efforts himself for operating the club, first as a restaurant --

THE COURT: He was available to testify as to what he did. He testified that he had never at any time employed union musicians and he testified that he had used it as a restaurant previously at some other time. He has given his testimony about that.

MR. SKEENS: However, Your Honor, Mr. Smollar made an objection

stating that the suit was filed in December of 1954 and we should not be permitted to put on any evidence that occurred subsequent to the filing of the complaint; and that this activity of Mr. Johnson's, when he actually got this Jimmy McPhail in the club and the union musicians --

THE COURT: What is this now? I don't understand this.

MR. SKEENS: This occurred after the filing of the complaint.

THE COURT: What occurred?

MR. SKEENS: Jimmy McPhail, a singer, had entered into an arrangement with Mr. Johnson to sing at the Bengazi while Mr. Johnson attempted to operate the club himself.

199 THE COURT: I think that instead of your putting this on the record that you should call him to the stand, and out of the presence of the jury let him put in the record what he would say. You have had him on the stand and he has testified some of these things that you are now bringing out. And another thing, too, from the way you stated this, no one could tell how you expected to prove any of these things.

Now, the court ruled that anything that was said by a union official and anything the union has done, you are to be permitted to show, but you are not permitted to show it by hearsay; you are to show it by somebody who has personal knowledge of it.

MR. SKEENS: Well that blanket objection will prevent Mr. Johnson from developing any of his testimony.

THE COURT: I think you had better get Mr. Johnson and put Mr. Johnson on the stand. Let him testify to these things so you will have your record, because the way you stated it now no one can know whom you expect to prove this by.

MR. SKEENS: Your Honor has already ruled today he couldn't testify to anything Mr. Murray told him, or anything that Mr. Middleton told him, or anything that Doctor Cowan told him.

THE COURT: Anything Mr. Murray, or Mr. Cowan, or anybody else was told by a union official can be shown here by them. But he cannot testify to hearsay as to what they told him.

200 MR. SKEENS: Well, that is what we were seeking to develop there

and, of course Your Honor's objection will prevent that.

THE COURT: My objection?

MR. SKEENS: I mean Mr. Smollar's objection being sustained will prevent that.

THE COURT: What objection do you have reference to?

MR. SKEENS: The objection Mr. Smollar made that Mr. Johnson is not competent to testify to any matters that occurred concerning the union where a union official was not present, because it was hearsay.

THE COURT: A person who knows of it only through hearsay cannot testify to it, but anybody who does know of it of his personal knowledge can testify to it. So if you can produce anyone to whom any of these defendants made such a statement, then you can prove that, yes.

Now, one other thing I would like to say, after I read your pretrial statement and saw that you had made some claim running up into 1956, I told you you could put that in.

201 MR. SKEENS: Yes, I recall that.

THE COURT: Now you come in and say that since I had said you could not put it on, that you want to make this proffer. I told you you could put it on.

MR. SKEENS: But that goes into the same type of evidence.

THE COURT: Whatever it goes into, I told you you could put it on. Now, I don't know what you have made here. Your statement is so general in its application without anything very specific as to who, why, or what, or how this is to be developed, that I do not think that it is an intelligible statement so therefore I think you better have your plaintiff here testify out of the presence of the jury. You can put in the record what it is that he wanted to testify to. I think that will clear it up.

MR. SKEENS: All right.

THE COURT: Is he here?

MR. SKEENS: Yes, he is down by the elevator waiting for that witness that we are waiting for to make sure he gets here without wandering around the courthouse.

THE COURT: I thought he could put on his testimony now, out of

the presence of the jury, as to these items that you want to cover.

I want it distinctly understood that anything that was said or done by the union, any official of the union, that can be identified, anybody who has personal knowledge of it, is going to be permitted to testify if

202 it has any bearing at all upon this suit.

MR. SKEENS: All right, Your Honor.

* * * * *

LORENZO MIDDLETON

was called as a witness on behalf of the Plaintiffs * * *

203 DIRECT EXAMINATION

* * * * *

206 BY MR. SKEENS:

Q. Did he give you any information concerning any property that he was holding?

207 MR. SMOLLAR: Your Honor, I object to the form of the question as leading. I have no objection to him relating the conversation he had with him at that point.

* * * * *

211 BY MR. SKEENS:

Q. All right, sir, on this occasion did you have a discussion with Mr. Johnson concerning the signing of the lease? A. Yes, we informed Mr. Johnson that we had heard that if we were to take the Bengazi over we would not be allowed to have topnotch entertainment in there because most topnotch entertainment were unionized, and that the union had the place on the blacklist; that we would be required to pay a weekly or a monthly amount to the union above the cost of our entertainment, if we took the place over.

Q. Now, did Mr. Johnson ask you where you got that information? A. Yes, he did.

212 Q. And what did Mr. Johnson say to that? A. Well, Mr. Johnson said that he didn't owe anybody anything on the place and he didn't see how that could be so; that he hadn't heard — that he knew that some of the preceding owners or managers owed various amounts on the place, but he didn't see why he was responsible for it. He thought everybody else would be responsible for their bills.

Q. Now, was there any communication between you and your brother-in-law with the union concerning this matter? A. Well, at first we didn't believe it, so--

MR. SMOLLAR: Your Honor--

MR. SKEENS: I am not asking for the conversations; I am asking for what they did, Your Honor.

THE COURT: What is it that you want?

MR. SMOLLAR: May I have the question read?

THE COURT: Yes.

(Question read by the reporter.)

THE COURT: You may answer that yes or no.

THE WITNESS: Yes, there was.

BY MR. SKEENS:

Q. Now, can you tell us where the communication was made; in other words, physically, where? A. Well, the communication --

213 MR. SMOLLAR: Just a moment. May I interpose this objection. I have no objection if he is going to testify about his own communication, but I certainly do have an objection if he testifies about his brother-in-law's communication, Your Honor.

THE COURT: Well, now, Mr. Middleton, we don't want you to tell us what somebody else told you, but we would like to know who it was that you talked with. Where did you go first when you had this communication with the union?

* * * * *

214 BY MR. SKEENS:

Q. Well, let me ask you, sir, to refresh your recollection, do you recall making a telephone call to New Jersey? A. I didn't make the call personally.

Q. Well, did someone make it at your direction? A. That is right.

Q. And that was your brother-in-law? A. That is right.

Q. And he contacted the national union office in New Jersey?

THE COURT: Just a minute. Just have him testify now about what he personally knows. Were you there at the time of the telephone conversation?

THE WITNESS: Yes, I had him call. I paid for the call and I had

him call.

THE COURT: Were you there when he made the call?

THE WITNESS: I was there when he made the call.

BY MR. SKEENS:

Q. Was it concerning the Club Bengazi? A. Yes, it was.

Q. Did you receive any communication from any union official?

A. We received a letter from Jersey.

215 Q. And do you know where the letter is now? A. No, sir, I do not have the letter now.

Q. Do you know where it is? A. I do not know where it is.

Q. Do you recall the substance of what was in the letter? A. What we wanted to know --

MR. SMOLLAR: Your Honor, I will object to that. This would be purely hearsay, as far as we are concerned. He says he received the letter. He does not have it now. And for him to testify orally as to what he believes the substance to be -- we don't know about any letter yet -- would be hearsay.

THE COURT: Well, he will have to explain about the whereabouts of the letter, or how it got lost, and so on, before you can go into what is in the letter.

MR. SKEENS: Thank you, Your Honor.

BY MR. SKEENS:

Q. Do you know what happened to the letter, Mr. Middleton? A. Well, we terminated our lease at the Donut Shop, as I said before, in 1955, January, and a lot of our papers were mislaid, and that was part of our records at the Donut Shop.

Q. Do you know approximately what time you received that letter, what period of the year? A. It was possibly between August and September -- I don't remember the exact day or the exact month, but it was between August and September.

216 Q. Of what year, sir? A. Of 1954.

MR. SKEENS: I ask now, Your Honor, whether counsel for the defendant has a copy of that letter in his file?

THE COURT: Have you asked the counsel to produce it before this?

MR. SKEENS: Yes, Your Honor.

THE COURT: Do you have it?

MR. SMOLLAR: I don't recall ever being requested to produce such a letter.

* * * * *

MR. SKEENS: Your Honor, it appears it is not in the interrogatories, but I am trying to locate the original pretrial statement. I think I made a request for production there sometime, but it is definitely not in the interrogatories.

217 Your Honor, it appears I can't find any paper making a request for production as such, so therefore I will withdraw the demand for production but I will ask counsel if he does have the letter.

THE COURT: Very well. Do you have the letter?

MR. SMOLLAR: There is no record of a letter, Your Honor.

BY MR. SKEENS:

Q. Sir, you were stating that you were moving out of the D. C. Donut Shop, with reference to what you had done with this letter. Will you please continue, sir. A. I was saying that the records, quite a few records, were misplaced in moving from one spot to the other, and I haven't seen the letter since that time.

Q. And when did you receive this letter? A. I say sometime between August and September of 1954.

Q. What was the substance of the letter? A. We had --

MR. SMOLLAR: I am objecting again, Your Honor.

THE COURT: Well, now, you know there is a best evidence rule, Mr. Skeens.

MR. SKEENS: The best evidence, Your Honor, is the letter itself. I believe under the rules of evidence, we have shown why it is not here.

218 THE COURT: You haven't made any demand for the letter. You have not been able to find any demand that you have made on the defendants for this letter.

MR. SKEENS: Yes, counsel for the defendants has stated that they

have no such copy with them here in court.

THE COURT: You not having demanded it, as I understand it.

MR. SKEENS: Apparently not, Your Honor.

THE COURT: Will you come to the bench, please.

(At the bench:)

THE COURT: What is it you are trying to show?

MR. SKEENS: The substance of the letter reflecting that the union advised Mr. Middleton that the Club Bengazi was on the defaulters list and, if he would like to operate the club, that he would have to make arrangements to pay off the outstanding indebtedness on the Club Bengazi, which in substance is the same information that was sent to Mr. Johnson in his letter.

MR. SMOLLAR: Your Honor, I am just advised by Mr. Gressman, my associate who has been with this case from the very beginning, that we know of no such letter to Mr. Middleton.

Now, I would be constrained to say if we did have such a letter that we certainly would produce it. There is nothing in our files locally, and there is nothing in our files that would indicate that we have ever sent a letter to one Lorenzo Middleton, or anyone acting in his behalf.

Now, I am objecting respectfully here because the only evidence he has shown as to the existence of a letter is Middleton's testimony. And I know this isn't proper to be made at the time of this objection, but for Your Honor's information he testified on deposition, Middleton, that this letter was in the possession of a brother-in-law who is now in Nassau.

* * * * *

MR. SKEENS: Your Honor, the witness has just testified it is lost; it has been misplaced.

I might say to Your Honor, in reference to replying to Mr. Smollar's objection, this doesn't go to admissibility; it goes to credibility. He has a right to cross examine this witness.

* * * * *

THE COURT: I think I will overrule this objection.

MR. SMOLLAR: All right.

* * * *

222

BY MR. SKEENS:

Q. As a result of that telephone conversation, you testified that you received this letter, which you don't have now. What was the substance of the letter? A. Well, there were three or four names listed and the amount of money owed to each of these persons.

Q. And what else did the letter say? A. They gave us their -- I forget -- frankly, I don't remember the full contents of the letter. It has been over a year ago but I do remember they had in this letter what we had asked them for, the people that were owed and the amount owed to each person. Other than that, I am not too familiar with the other contents of the letter.

* * * *

BY MR. SKEENS:

Q. Did it say that you had to do anything? A. Well, it stated the terms -- I am sure it had some provision in there for the amount that could be paid each month or each week or whatever way they had it, and I think it was weekly, if I am not mistaken.

223

Q. Now, had you, yourself, ever before in your life hired any Federation musicians to perform? A. No, I hadn't.

Q. Were you ever personally indebted to any of them yourself? A. No, I have never had any occasion to employ them.

* * * *

225

BY MR. SKEENS:

Q. Will you please, then, relate the substance of your conversation? A. Well, at the time, the Donut Shop was doing very good there on Fourteenth Street. In fact, we really didn't have enough room to handle our customers at certain hours of the night, and the Bengazi would have been more or less an overflow spot for people who wanted a little quieter atmosphere, and what not. That was the reason we were contacting him about the Bengazi.

Q. Is it your testimony then that your idea was to have the overflow from the D. C. Donut Shop go to the Bengazi as patrons? A. That is right.

* * * * *

228

BY MR. SMOLLAR:

Q. Well, then, you didn't really anticipate that the Club Bengazi would be quiet when you funneled off these customers from the D. C. Donut Shop to the Club Bengazi? A. I didn't say quiet, now, in the sense of no noise. Now, the Donut Shop is quite a different type of place from the Bengazi. It is right off of the street, off of Fourteenth Street. It seats --

Q. Can you just answer the questions I ask you, Mr. Middleton?

A. I am trying to explain to you.

MR. SKEENS: I object to Mr. Smollar not allowing the witness to answer the question. If it is not responsive, Mr. Smollar should move it be stricken. But he should allow the witness to answer the question.

MR. SMOLLAR: This is the kind of instruction I appreciate, Your Honor.

* * * * *

229

Q. Now, in connection with your contracting business, do you maintain a bank account anywhere? A. No, I do not maintain a bank account.

230

Q. All right. Now, in connection with your own personal affairs, do you maintain a bank account anywhere?

MR. SKEENS: Just a moment. I object to his own personal affairs, Your Honor, I would like to pursue this line. If we may approach the bench, I will tell Your Honor what I have in mind.

(At the bench:)

MR. SMOLLAR: The essential ingredient in an unlawful interference of a contract case is the proof that, but for the interference of the defendants, this plaintiff would have negotiated a contract.

THE COURT: Yes.

MR. SMOLLAR: I am going to show, and intend to show, that this man has been insolvent ever since January of 1954; that he has never had more than three hundred and fifty dollars or three hundred and sixty dollars; that this contract which he was intending to negotiate at the rate of six hundred a month was a spurious one and that he couldn't have entered into it as a straight economic matter.

THE COURT: What about his wife?

MR. SMOLLAR: He hasn't said anything on direct examination about even supporting himself in this venture.

THE COURT: Let us see this proposed contract. This is in his name alone.

231 MR. SMOLLAR: That is correct, Your Honor. I want to cite briefly Bailey versus Hans Wats Realty Company, 113 West Virginia 739.

THE COURT: On what proposition?

MR. SMOLLAR: On the proposition I am referring to right here.

THE COURT: Very well, I will overrule this objection.

MR. SKEENS: May I state my reason in opposition to Mr. Smollar?

THE COURT: Yes.

MR. SKEENS: Your Honor, the rules on that point are not in agreement. Your Honor will find in a majority of States that all that is necessary is that he be ready and willing. It is not even necessary that he be able to perform the contract. Ability to perform the contract is not an essential element.

I will say further, Your Honor, if Mr. Smollar wants to pursue that field, I think he should go into the deal itself, whether the six hundred and the amount he was going to take in -- how much he was going to gross, and how he expected to make profit; and not on whether he has a personal bank account.

MR. SMOLLAR: That was his problem, Your Honor.

232 THE COURT: The objection is overruled.

(In open court:)

(Pending question was read by the reporter.)

THE WITNESS: I said no, not at the present time.

BY MR. SMOLLAR:

Q. When was the last time you had a bank account anywhere in the District of Columbia or elsewhere? A. Oh, I would say about a year ago I had a bank account.

* * * * *

Q. And when was the last time you had an account at the City Bank?

A. Oh, I would say about eighteen months ago.

Q. About eighteen months ago. And how long had you --

233 MR. SKEENS: I object to any further inquiry along this line. We are opening up an entirely collateral issue.

THE COURT: The objection is overruled.

* * * * *

234 BY MR. SMOLLAR:

Q. And when did you leave the D. C. Donut Shop? A. January, 1955.

Q. January, 1955? A. That is right.

Q. Are there any claims pending between you and the lessor as a result of your operation? A. There are no claims pending between me and the lessor.

Q. You are sure of that? A. Positive.

Q. You paid your rent to date at the time you left? A. Yes, I did.

Q. You are positive of that? A. Yes, I am.

Q. And you are stating that under oath? A. That is right.

MR. SKEENS: Your Honor, I object. We are still going further and further and deeper into collateral matters; it has nothing to do with this case.

THE COURT: The objection is overruled.

BY MR. SMOLLAR:

* * * * *

238 Q. And this purported lease that you were negotiating with Mr. Johnson, that would have been the first time you had entered into the night club business? A. That is right.

239 Q. Up to that time, your only experience in the business of clubs was in connection with the restaurant business? A. That is right.

Q. And had your sole experience been with the D. C. Donut Shop? A. That is in the restaurant business?

Q. Yes. A. Yes, that is right.

* * * * *

241 MR. SKEENS: Just a moment.

MR. SMOLLAR: I had not finished my question.

MR. SKEENS: I have another objection. Mr. Smollar is standing right in front of me and I can't even see the witness.

THE COURT: Very well, sir.

MR. SMOLLAR: That is the first valid one I have heard.

MR. SKEENS: I ask that be stricken, Your Honor.

THE COURT: Well, I did not hear it. Whatever it was, it is stricken.

MR. SMOLLAR: Very well.

* * * * *

242 BY MR. SMOLLAR:

Q. Did your wife file a separate tax return? A. I think she did.

Q. Now, was that for the year 1954? A. That was for 1954, yes.

MR. SKEENS: Just a moment, I have another objection to this line of testimony. Now we are into income tax returns, Your Honor. I think we are going wide afield here. This is definitely collateral and really he is not bearing on the issue that Mr. Smollar offered at the bench.

THE COURT: Well, it seems to the Court that it is. The objection is overruled.

* * * * *

244 BY MR. SMOLLAR:

Q. Mr. Middleton, do you know a man named Benny Caldwell? A. I have met Mr. Caldwell, yes.

Q. Do you know where he lives now? A. I haven't seen Mr. Caldwell for about a year. I don't know where he lives.

Q. Do you have any idea of where he is now? A. He used to be a customer of mine at the Middleton's Restaurant. I haven't seen him for about a year.

* * * * *

247 Q. Now, will you tell us how much money you had in August of 1954 and where you had it? A. Well, frankly, the amount of money that I had on hand at that time I don't know; but at the time I had my brother-in-law with me who was going in as a partner. He was just discharged from the Army. He had money to invest in this business. He was working with me and it was actually his money that was to be used.

Since then, since this deal has gone through, he has gone to Bermuda and has opened up a similar type of business in Bermuda.

* * * * *

253

(In open court:)

BY MR. SMOLLAR:

Q. Mr. Middleton --

MR. SKEENS: Your Honor, I object to counsel talking to each other so that the jury can hear them. I think that is highly improper.

THE COURT: Well, I did not hear it.

MR. SKEENS: I clearly heard it and I am sure the jury heard what counsel said.

THE COURT: If the jury heard anything that counsel said, the jury will disregard it completely.

* * * * *

259

BY MR. SMOLLAR:

Q. Do you have any interest in that restaurant at all other than your occupation there as manager? A. I do.

MR. SKEENS: Just a moment. I have another objection, Your Honor and that is this: Mr. Smollar has in his hand a paper, which has not been identified, within four feet from the jury, holding it in his hand, exhibiting it in the jury's presence. I think that is improper.

If he wants to question on some paper that is not in evidence, he ought to do it from the counsel table, not where the jury can view a document that is not an exhibit.

THE COURT: Well, I don't believe that the jury has been able to see what he has in his hand, and I haven't seen him exhibit it to the jury. Perhaps it would be better to stand over here.

MR. SMOLLAR: Very well, Your Honor, it is only that I am suspect. I will get as far away as I can.

MR. SKEENS: I object to those comments.

THE COURT: Very well, the comments will be stricken; the jury will disregard them.

* * * * *

REDIRECT EXAMINATION

BY MR. SKEENS:

Q. Do you remember when I asked you earlier on direct examination why you did not enter into the lease and there was an objection entered? Keeping that question in mind, will you please answer this question: Why didn't you go into the Bengazi pursuant to your lease negotiation? A. Why didn't we follow the lease through?

Q. Yes. A. I thought I had explained that we didn't follow it through because of the understanding that we would have to pay these back bills to the union. That was the one reason we didn't go through with it.

Q. Actually, then, when you entered into these negotiations with your brother-in-law, you were relying on your brother-in-law in the financial backing for this transaction? A. Well, frankly --

267 MR. SMOLLAR: Just a moment. That is objected to on the ground that it is leading. He is still your witness.

MR. SKEENS: Your Honor, it is redirect examination.

MR. SMOLLAR: It is not proper redirect.

THE COURT: The objection is sustained.

MR. SKEENS: Your Honor, may I reply to that? I say, Your Honor, it is basic law that a counselor is allowed to lead the witness on redirect evidence.

THE COURT: No. You may call his attention to some particular thing, but you may not form a question that just calls for a yes answer or to indicate to him the answer.

MR. SKEENS: May I have an objection to that ruling?

THE COURT: What is that?

MR. SKEENS: That I have an objection to that ruling.

THE COURT: You mean may you have an exception to it?

MR. SKEENS: I object to the Court's ruling that I cannot ask leading questions on redirect.

THE COURT: You may not do so.

MR. SKEENS: All right, Your Honor.

THE COURT: And you may have an exception to the Court's ruling.

MR. SKEENS: It is respectfully excepted, of course.

THE COURT: Oh, certainly.

268

MR. SKEENS: I will reframe that question.

BY MR. SKEENS:

Q. Did you expect to finance this yourself, this deal with the Bengazi; in other words, to pay the six hundred dollars rent and pay whatever is necessary to put that club into operation?

MR. SMOLLAR: Your Honor, I am going to object to that. I think he can direct his question as to his economic position, but what he expected to do is to go into his state of mind at the time and I don't think it is proper.

MR. SKEENS: I will reframe it, Your Honor.

BY MR. SKEENS:

Q. Was there anyone else who was to assist you financially in the Bengazi deal? A. I think I stated --

MR. SMOLLAR: Your Honor, I am going to object to that because I don't think it is relative to any issue in this case. He is the one who signed this lease in this case.

THE COURT: I think he has gone into that very thoroughly.

MR. SKEENS: All right, Your Honor.

* * * * *

272

RECROSS EXAMINATION

BY MR. SMOLLAR:

Q. Mr. Middleton, as a businessman running a restaurant, you understand that establishments of that kind have to get occupancy permits; is that correct? A. That is true.

MR. SKEENS: I object, Your Honor, this is beyond the scope of redirect.

THE COURT: The objection is sustained. He has not asked about occupancy permits.

MR. SMOLLAR: He has asked about the number of people you can get in, Your Honor, because the occupancy permit has to do with the number of people permitted in an establishment.

MR. SKEENS: Your Honor, I don't see where that is relevant. He

is going to open an entirely new collateral field.

THE COURT: You are the one who asked about the number of people.

MR. SKEENS: Mr. Smollar asked about the fifty or sixty people; I merely clarified that that was only the seating part. That is all. I clarified it. I was not bringing in anything about how many it could hold. I was just clarifying the witness's testimony.

273 THE COURT: Whatever you were clarifying, the witness testified about the seating as well as the other in his answer. If you can frame your question so that it relates to the seating, then you may put it; but otherwise, I am going to have to sustain the objection.

MR. SMOLLAR: Then, as I understand it, Mr. Skeens' objection is related to the fact that he is not contesting any issue but the number of persons who can be seated in this club; that as far as the evidence is concerned it is sixty, and that is the maximum.

MR. SKEENS: I never said any such thing, Your Honor. I am only relying on what the witnesses are testifying here in court.

* * * * *

274 MR. SKEENS: I object. Mr. Smollar will not permit the witness to answer the question in full.

275 THE COURT: Just a minute. You may let him finish. You may answer.

MR. SKEENS: I request the reporter to read the answer where Mr. Middleton was interrupted.

THE COURT: Very well.

(Answer was read by reporter.)

THE COURT: Have you finished?

THE WITNESS: Yes, I finished.

BY MR. SMOLLAR:

Q. Had you finished when I began? A. I had a thought in mind, but I have lost it now.

* * * * *

LOUIS E. MURRAY

was called as a witness * * *

* * * * *

284 Q. At the time that you attended the Club Bengazi, would you say that it appeared from looking at the attendance and the type of entertainment, as to whether or not it appeared that it was a successful operation to you?

* * * * *

286 THE WITNESS: Well, during those years that I mentioned, I would say unquestionably the Bengazi was a success.

* * * * *

289 THE COURT: What do you understand the question to be?

THE WITNESS: I think Mr. Skeens' question was during the time that Mr. Mann operated the Club Bengazi, what was my observation as to business conditions during that particular time? * * *

THE WITNESS: At the time Mr. Mann operated the Club Bengazi, business all over was good.

* * * * *

297 THE WITNESS: My first negotiation was with the Gala Agency in New York City.

BY MR. SKEENS:

Q. Did that negotiation culminate in an agreement for someone to perform in the Bengazi, a musician? A. It did.

* * * * *

BY MR. SKEENS:

298 Q. Now, then, sir, did there come a time when you learned that Mr. Garner was not going to appear in the Club Bengazi? A. Yes, I did.

Q. Who told you that? A. I was told by the secretary of Local 710 here in Washington, Miss Gladys Moore.

Q. What did she say to you? A. She said that she had gotten a letter from the national office in New York, signed by Mr. Petrillo, that Eroll Garner would not be permitted to go into the Bengazi because it was on the defaulters list. And that was two days prior to the contracted opening date.

Q. Now, sir, what arrangements did you have for that opening date? A. I had advertised the attraction extensively. I had promoted it. I had purchased stock and had hired extra help to facilitate the business at that particular time.

Q. And what were you obligated to pay Mr. Garner for his performance at the Bengazi? A. Seventeen hundred and fifty dollars a week.

Q. And as a result of the information that you received from Gladys Moore, what did you do? A. I went in to see Miss Moore.

Q. How did you receive this information? A. By one of the union representatives. I don't recall the gentleman now, but he was at one time a representative of the Local here, 710.

* * * * *

299

BY MR. SKEENS:

Q. After you received this information from Gladys Moore, what did you do then? A. I immediately went to the Local 710 and began discussions with Miss Moore and Mr. Robinson, who was the president I believe of the Local at that time.

Q. And what did they tell you? A. That it was a matter purely out of their hands; that it was an order sent down by the national office; and that they could not touch it.

Q. What did you do after that? A. I went over to see Mr. Schwarz.

* * * * *

300

BY MR. SKEENS:

Q. What did he tell you, sir? A. He was very sympathetic with my position at that time and he said, "We will see if we can't do something."

Q. What did he do in your presence? A. He immediately called the New York office, got Mr. Rex Ricardo on the phone, I believe, who was Mr. Petrillo's secretary at the time, and arrangements were made for Eroll Garner to come in as scheduled.

Q. Was he successful? A. Yes, he was.

Q. Now, what else did you do in order to continue receiving musical entertainment in the Club Bengazi with reference to the defaulters list?

A. Well, my arrangement with the Local 710 was that I pay a certain

amount of money each week on the existing debt that was outstanding owed to musicians at the Club Bengazi.

Q. With whom did you make that agreement? A. The agreement was made with Mr. Schwarz, who was the president of the Local 710, I mean 116.

Q. Now, during these negotiations did you have occasion to leave the city and go to another musicians' union office concerning your negotiations? A. I did.

301 Q. Where was that? A. I went to Newark, New Jersey. * * *

Q. And whom did you see in Newark? A. I talked to a gentleman who was the treasurer of the American Federation of Musicians. His name was Leo Clusemann.

Q. What did he tell you? A. I carried with me proof of ownership, my lease, my license, and I explained to him that I knew nothing of the previous operation or I knew nothing of the existing debts and I had nothing to do with them, the proprietors, and I was a new owner entirely and, of course, he explained to me that they were bound by law, that the debt did exist, and in order for me to continue using federation musicians there I would have to pay so much per week.

Q. Well, upon hearing that information, did you consider using non-federated musicians? A. No.

MR. SMOLLAR: That is objected to, Your Honor, please.

302 THE COURT: The objection is sustained.

BY MR. SKEENS:

Q. All right, Mr. Murray, how much money did you pay to the federations as a result of the agreement you made?

MR. SMOLLAR: Your Honor, that is patently objectionable. I don't see what purpose it would serve for this jury or the Court to know what his obligations were between himself and the union, and how it would help in any proof in this case of any issue.

THE COURT: You may answer.

THE WITNESS: I don't know how much money I paid. I paid quite a lot of money over a period of time. I didn't keep up with it because at

that time I didn't consider it important.

BY MR. SKEENS:

Q. Could you estimate whether it is over or under a thousand dollars? A. I would say over a thousand dollars.

Q. Do you remember how much the total outstanding indebtedness was of the Club Bengazi? A. It was thirty-two hundred dollars that was quoted to me at the time I became interested in it.

Q. Now, how were these payments made? A. There was an initial payment made --

303 THE COURT: Just a minute. I am going to sustain the objection from here on in about these amounts and how they were paid. It does not have anything to do with this particular matter. You go now to some other subject.

* * * * *

BY MR. SKEENS:

304 Q. To whom did you make those payments? A. I made payments locally to the two unions, Local 710 and Local 116.

Q. Did you go to the office or did they come to you? A. I went to the office on many occasions.

THE COURT: You said 116; do you mean 161?

THE WITNESS: 161.

BY MR. SKEENS:

Q. And on the occasions that you didn't go to the office -- A. They would send someone to me.

Q. Do you know who that person was, or persons? A. On many occasions Miss Moore came herself, and a gentleman from 161 -- I don't recall his name now.

THE COURT: How long had you been in this Club Bengazi before you started trying to get any union musicians?

THE WITNESS: Judge, it was my intention to use --

THE COURT: I don't want to know what your intention was, but just --

THE WITNESS: I started with union musicians -- I opened with them when I obtained a liquor license. My first attraction was union members.

* * * * *

305

BY MR. SKEENS:

Q. Was it possible for you to get union musicians before that time?

A. I put forth no effort to getting it. It wasn't necessary at that time.

Q. Did the liquor license have any consideration in determining that fact? A. Yes, it did.

Q. Will you explain to the jury why there was a lapse from the time you went in until the time you obtained union musicians? A. The ABC Board, which was the Alcohol Beverage Control Board here in the District of Columbia, requires that any person wishing to obtain a license for on the premises consumption must first establish a restaurant to their satisfaction. You must first convince them that you are selling enough food to meet their minimum requirement before they will release a liquor license.

Q. Now, then, sir, can you tell the jury whether or not the activity of the union, while you were maintaining the Club Bengazi, in any way interfered with your operation?

MR. SMOLLAR: Your Honor --

THE WITNESS: They did not.

MR. SMOLLAR: That is highly inappropriate and highly improper.

306

BY MR. SKEENS:

Q. Other than what you have testified to now.

THE COURT: Now, he has answered that.

MR. SMOLLAR: What was his answer, if I may ask?

(Last answer of the witness was read by the reporter.)

BY MR. SKEENS:

Q. Now, then, sir, from your experience in the night club business and your operations of the Alex and Louis Club, Club Bengazi, and your other experience that you have mentioned earlier, would it be possible to operate the Club Bengazi successfully with non-union musicians in the District of Columbia?

MR. SMOLLAR: That is objected to, if Your Honor please.

THE COURT: The objection is sustained. You want him to express

an opinion?

MR. SKEENS: Yes, Your Honor.

THE COURT: Well, the objection is sustained.

MR. SKEENS: I submit that he is qualified, Your Honor, under the foundation that I have laid with the witness, to give his opinion as a man who has actually operated the Club for a period of two years.

THE COURT: Whether or not something can be operated successfully depends many times upon who is operating it. I will sustain the objection.

* * * * *

307

CROSS EXAMINATION

BY MR. SMOLLAR:

Q. Mr. Murray, at the time you negotiated this lease with Mr. Johnson, you didn't know the Club Bengazi was on the defaulters list, did you? A. I did not, sir.

Q. Mr. Johnson didn't tell you that, did he? A. No, he did not.

Q. So that when you negotiated with him about the Club Bengazi, you negotiated with him without any knowledge whatsoever about the fact that the Club Bengazi was or was not on the defaulters list; is that right.

A. That is true, we never discussed it.

Q. And you didn't know it? A. I did not know it, sir.

Q. And when you finally agreed to the terms of the lease and when you finally agreed to the terms of the monthly rentals, that agreement for the monthly rental was on the basis of an arm's length dealing with Mr. Johnson over a period of a few weeks or a few months; is that right? A. That is true.

Q. And when you paid two hundred and fifty dollars a month rent for the Club Bengazi, that is what you thought it was worth at that time; is that right? A. Yes, sir.

308

Q. And you were in there for approximately two years? A. Yes, sir.

Q. And for at least one year you were serving high-class entertainment? A. Yes, sir.

Q. Did you make any money?

MR. SKEENS: I object to the question, Your Honor.

THE COURT: The objection is overruled.

MR. SKEENS: It has no relevancy here.

THE COURT: Well, the objection is overruled.

BY MR. SMOLLAR:

Q. Did you make any money with your high-class entertainment?

A. No, I did not.

* * * * *

309

REDIRECT EXAMINATION

BY MR. SKEENS:

Q. You stated that you paid two hundred and fifty dollars a month rent. There was a down payment also, was there not? A. Yes.

Q. How much was that? A. I paid Mr. Johnson two thousand dollars down.

310

Q. Now, sir, actually you had been talking from the summer of 1951 until the lease was negotiated in September before you finally arrived at that figure; is that true? A. That is true.

Q. And actually Mr. Johnson wanted much more than that; didn't he? A. He did.

* * * * *

Q. And during the course of time you paid the union, how much did you say? A. I did not say. I said I paid them a considerable sum, but I don't know just how much.

311

Q. Remembering the question from page 46 just to refresh your recollection, sir, at the deposition you gave on April 23, 1956, page 46:

"Q Would you say it was over \$2,000? A. No. Less.

"Q What? A. Less than 2,000.

"Q Would you say it was in the neighborhood of \$1,500 to \$2,000?

"A Over a period of time I couldn't begin -- because I didn't keep account of it. I don't know what I paid. I know I paid several payments, two, three, like that, each time. I paid the \$100 a week for a short period of time and then later I paid \$50 for quite a spell

and later \$25 a week on various accounts prior to my becoming the proprietor."

In substance your answer to the question you heard? A. That is right.

Q. Do you think, having heard that, that might refresh your recollection as to what you may have paid? A. I would say between one and two thousand dollars.

Q. And during that time you were also running high-class entertainment and putting out money for advertising? A. Yes, I was.

* * * * *

312

RECROSS EXAMINATION

BY MR. SMOLLAR:

Q. When you were with the Louis and Alex Club, were you ever put on the defaulters list? A. Yes, I was.

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MR. SKEENS: We will prove that Dr. Cowan was negotiating the entry into a lease with Mr. Johnson, and that the reason why he didn't go through with it was because he learned the Club Bengazi was on the defaulters list.

MR. SMOLLAR: Your Honor, the only evidence we have in that connection is testimony --

THE COURT: Would you be willing to stipulate not that that is true, but that if he were here he would say that.

MR. SMOLLAR: I will tell you what I would be willing to stipulate Your Honor. I would be willing to stipulate to the fact that if he were here he would say that, and that he didn't have any money to go forward with it, because that is the testimony of Mr. Johnson on his deposition as to the reason Cowan didn't go forward with his lease.

So we'll stipulate that there are two reasons that Dr. Cowan didn't go forward with the lease: one, that it was on the defaulters list and, two, that he didn't have any money to go forward.

THE COURT: You say Mr. Johnson said he didn't have --

MR. SKEENS: We will accept that stipulation.

THE COURT: Oh, you will?

MR. SKEENS: Certainly.

THE COURT: Well, then, that will save time.

MR. SKEENS: I appreciate that.

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317

LOUIS E. MURRAY

resumed the witness stand * * *

FURTHER REDIRECT EXAMINATION

* * * * *

BY MR. SKEENS:

Q. Mr. Smollar asked you a question on recross examination as to whether or not it was true that while you were operating the Louis and Alex Club whether you, yourself, had been placed on the national defaulters list, and your answer was yes.

Now, sir, will you please give the jury your reason why you were placed on the list, the circumstances. A. I had entered into a contract with a Canadian pianist, known as Oscar Peterson, who headed a small musical group. The pianist was a citizen of Canada. He was to open Sunday and he didn't show up for his opening engagement. He came on

318

Monday instead. I accepted him on Monday and he worked five days instead of six days. At the end of the week I paid him the money due him, minus the one day that he failed to show up.

The agency who negotiated the contract was the Shaw Agency in New York City, along with the man who was responsible for bringing him into this country, who was Norman Grant, a producer.

They filed a claim with the union stating that I failed to pay Oscar Peterson his contracted price, and there was a considerable amount of correspondence between the union, Oscar Peterson, and myself. It went on for several months. I became disinterested and I failed to answer the correspondence and they declared that the claim, which he had for the extra day which he didn't work, was valid. I refused to pay it over a period of time, and of course my refusal put me on the musicians defaulters list.

MR. SKEENS: That is all I have.

FURTHER RECROSS EXAMINATION

BY MR. SMOLLAR:

Q. I just want to ask you one question, Mr. Murray. During the time you occupied the Club Bengazi -- and I believe it was two years -- did the union or the defendant, American Federation of Musicians, do anything to interfere with your contract with Mr. Johnson? A. No.

* * * * *

MR. SKEENS: At this time, Your Honor, the plaintiffs will offer the following questions and answers to interrogatories that were propounded to the defendants, which are on file in this case.

* * * * *

320 Question 7:

321 "7. How is an establishment removed from the National Defaulters List?" Answer to 7: "7. An establishment may be removed from the National Defaulters List by good faith negotiations resulting in an arrangement for paying past indebtedness or in a showing that the present establishment is in no way responsible for the past indebtednesses."

* * * * *

322 Question 10:

"10. State names and addresses of all musicians who have performed at the Club Bengazi since 1946 who were not paid for their services at the time? Were these indebtednesses subsequently satisfied in whole, or in part, and how was this accomplished?"

Answer: "10. Charlie Ventura, member Local 77 c/o Joe Glaser, 745 5th Avenue, New York, N. Y. No record that his claim for \$1,815.17 was ever satisfied. "Paul Williams, member Local 5, 2317 Edison, Detroit 6, Michigan. On July 10, 1949, \$200 of his \$1,016 claim was paid, leaving a balance of \$816 still unpaid.

323 "Charles Brown, member Local 47, 3427 3rd Avenue, Los Angeles 18, California. Claim of \$2,365.11 never satisfied.

"Erroll Garner, member Local 802, c/o Martha Glaser, 520 5th

Avenue, New York, N. Y. Claim of \$375 never satisfied. He also filed a separate claim for \$1,000 against Club Bengazi but the International Secretary refused to honor the claim since it was filed too long after the default. "

* * * * *

332 (In open court:)

THE COURT: Members of the jury, I understand that the plaintiff had intended to call James R. Cowan, a witness who is outside the jurisdiction, and they haven't been able to have him here. Now counsel for both sides have agreed to stipulate and this is the stipulation which the jury may regard as evidence in this case:

That if this James R. Cowan did appear here, he would testify that he did not enter into an agreement for the leasing of the Club Bengazi, and that he did not do so because the Club Bengazi was on the defaulters list, and also that he did not do so because he did not have the requisite funds.

333 * * * * *

THE COURT: Very well, then, it will be understood that it means the requisite funds for the operation of the Club Bengazi; is that correct now?

MR. SMOLLAR: That is correct.

MR. SKEENS: Yes.

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337 ORAL ARGUMENT ON BEHALF OF DEFENDANTS
ON MOTION FOR DIRECTED VERDICT

MR. SMOLLAR: May it please the Court, before I make my motion for a directed verdict under Rule 50, federal rules of civil procedure, I would like to suggest to the Court that I am not going to address myself to counts two and three because I don't feel that there is anything I can say as to counts two and three which would be helpful to this Court, in view of the clear absence of any testimony at all as far as the presence of a libel is concerned or so far as the presence of a conspiracy between the defendants and an employer group or any other group, which would

make them responsible under the Sherman and Clayton Act. There is no question about the entire absence of testimony as to those two counts.

* * * * *

338 Now, there has not been a shred of evidence and there has not been a case offered, which would show in any way that a union activity which publishes in its magazine a credit rating for the aid and assistance of its members, or to guide its members, is an activity that is not legitimate.

* * * * *

341 So we get to the Middleton contract which is the only evidence that might suggest, assuming that the activity of the defendants was legal in this case, that there might be an interference with the contract or with the right of contract, but with whom?

Middleton says he didn't sign the lease. First he said -- I believe he said -- he couldn't say clearly whether he did or didn't sign the lease.

Did the union interfere with Middleton at all when Abbott, the brother-in-law who is not a party to this arrangement between Johnson and Middleton, writes a letter to the union? We have a letter written back, which can't be brought forward here because it isn't found, assuming there is a letter written back and assuming there was a communication in the first place. But giving all the reasonable inferences, we have a letter written back to a Mr. Abbott, the brother-in-law who is not a party to this lease, who is not mentioned in the complaint -- the complaint says Middleton -- which says that in order to get off of the defaulters list you have to do certain things.

342 Now, in addition to that, they have to show that Middleton was in a position, assuming that there was a contract to be negotiated and not already negotiated, to carry out the contract in the event the parties could agree.

The sole testimony on the question of his economic responsibility came on cross examination. And for a period of three years, he has indicated clearly that he has been economically insolvent.

* * * * *

THE COURT: But on the question of interference, the only thing

that has been offered is simply this letter, is it not?

MR. SMOLLAR: That is correct, Your Honor.

* * * * *

347 But even if it isn't a lawful activity, Your Honor, there has been a complete absence of any showing, one, of the fact that the defendants knew of these contracts that they were allegedly interfering, which I think is vital, and, two, there is a complete absence of any proof of damages. Assuming that there is a cause of action here, I have heard no proof at all on the subject of damages in this case, Your Honor.

That, I believe, Your Honor, concludes my argument on a motion for a directed verdict, and I think if there is any case that cries for a directed verdict, it is this case, Your Honor.

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349 ORAL ARGUMENT ON BEHALF OF PLAINTIFFS
IN OPPOSITION TO MOTION FOR DIRECTED VERDICT

MR. SKEENS: The defendants move for a directed verdict by and through their attorneys on the basis that as a matter of law the evidence adduced by the plaintiffs does not state a prima facie case. The evidence must be taken as true for purposes of this motion with all legitimate inferences taken from it.

Before I go into a discussion of the background of this case, I would first like to state that Your Honor has lack of jurisdiction to entertain this motion because, as I stated earlier on the record, Mr. Smollar had made an opening statement for the defendants at the conclusion of the opening statement by the plaintiffs.

THE COURT: Regardless of that, at the end of the plaintiffs' case he has a right to make a motion if he wishes to.

MR. SKEENS: I say, Your Honor, for the record that he has no authority to make this motion at this time until he concludes his case

350 because he has made an opening statement, and now he stands before the jury and he has to prove what he says. He may make his motion at the end of his case but not at the end of plaintiff's case. That is my position.

Now, then, assume Your Honor decides that you have jurisdiction, we now come to the very interesting case, I think -- of course it is one that I have been with for several years -- and one thing I will say to Your Honor from the beginning and I will like it to be in Your Honor's mind completely throughout my argument and not lose sight of the fact that the plaintiffs do not dispute the fact that the union has a right to maintain a blacklist. I do not care whether they call it a credit list, a defaulters list, or what not, they can maintain a blacklist. I say they can and I say it is helpful and I would like Your Honor to keep that in your mind throughout my argument. I don't dispute that fact. The only thing I say is that it must be in conjunction with a legitimate labor union activity.

* * * * *

355-56

THE COURT: Well, you may approach your discussion any way that you choose, except that I would like an answer to this question that I asked you about count one, if you would specify for me what it is that you claim is an interference with the contract rights of the plaintiffs.

MR. SKEENS: Generally speaking, without referring to anything, the theory of the cause of action is that the defendants have either interfered with an existing lease or that they have interfered with prospective lessees.

THE COURT: I understand that. What I am trying to find out is what do you claim you have shown by the evidence to support that charge? That is what I want from you.

* * * * *

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MR. SKEENS: That the blacklist, as it was used, was unlawful; that since it was unlawful, and they having communicated it to prospective lessees or having actually forced an existing lessee to make payments in accordance with that system, that illegal system, and the fact that they have used an unlawful boycott to enforce it and make it work; that all of this conduct put the burden on the plaintiff to pay off this debt or else he could not operate the club; that when a lessee such as Doctor Cowan learned that it was on the defaulters list, he was no longer interested in leasing the club; and that the plaintiff was illegally damaged thereby. That is just

one example. That is in theory the action.

And the union knew it because Feldman put them on notice. For example, he came into the office and tried to negotiate it. The union knew that the club was on the list and they knew he was trying to get off of it so he could operate the club. They had the knowledge that this man

358 was in there and they knew. They presume from their actions -- by the law, the malice is presumed from their conduct -- they know that the only way that they can ever collect this money is to get these new operators to toe the mark and start paying off these old bills. That is the entire operation, how it works.

They don't go after old ones and try to collect the judgment from Paul Mann when he is up in New York or some place else operating a club. They even take him off their list up there. Your Honor, if you will interpret those interrogatories you will find that bills are outstanding against those gentlemen today and they have been taken off the list, which I can point out if Your Honor thinks it is important, but that is just one element.

This is an unlawful method of collecting money by an unincorporated labor organization that has no right to do that. It has no right to enter into that activity which they put the Club Bengazi -- or any other -- the Hotel Statler, or anything else that is not incorporated, not a human being, that cannot be sued, that cannot sue, and to place it against the piece of property. Regardless of what name you give it, it does not -- the blacklist is still there; it is still in operation.

That is unlawful. It is an unlawful means of collecting it and they are collecting it from the wrong people. And not only that, the union has no right to enter into that activity.

359 What the union does have a right to do, as I said from the outset, the blacklist is lawful by itself and this is the way it is lawful: When they make a blacklist and put Paul Mann on it and advise all union musicians not to play for him because he didn't pay, it is perfectly lawful. I see nothing wrong with that. Any credit organization should have the right to do that. I would never dispute the union's right to do that.

But when they undertake to collect from people who do not owe the

money and they impose an unlawful boycott against the establishment, which is not a person that can sue or be sued, that is going beyond the lawful means of a legitimate labor union activity, and especially going after a person who owns the property, who has no relationship with a wage earner.

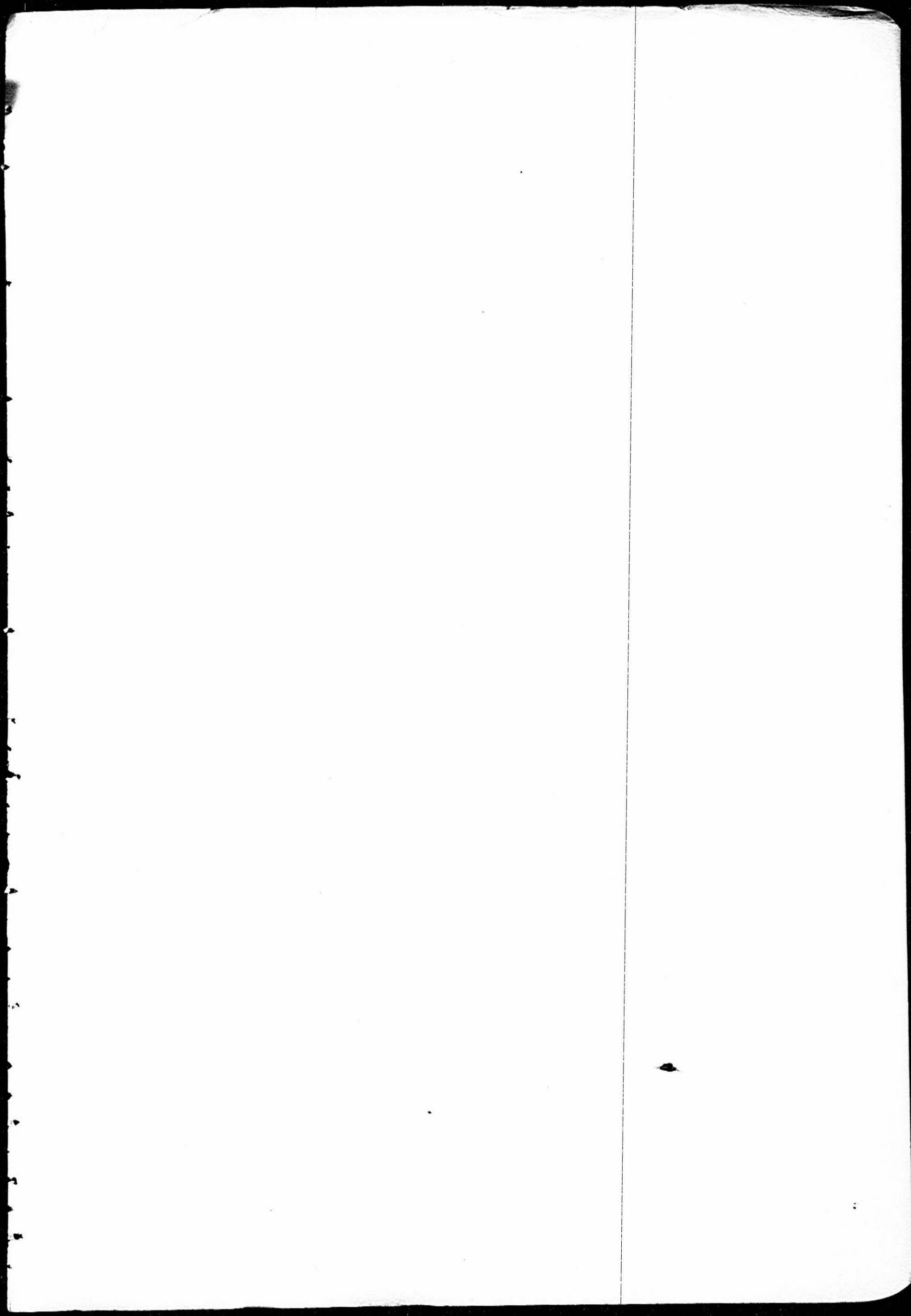
* * * * *

363 THE COURT: The way that I see this, Mr. Skeens, is that here
 you have a group of people who organize into a union. And this group
 of people or body of people agree that they are going to be bound by the
 rules and regulations of this group or society, and they adopt these rules.
 364 So it is just a body of rules that these musicians are bound by in their
 union, and they agreed that they will do thus and so. And one of the things
 is that if they don't get paid their money by an establishment, that then
 they will not play at that establishment while it is on this defaulters list
 where they have been put because they failed to pay the wages of the musi-
 cians.

MR. SKEENS: That is fine. If Paul Mann was still operating the Club Bengazi, it could remain on the defaulters list forever, Paul Mann, not the Club Bengazi but the operator.

THE COURT: Well, it does not seem to me it makes any difference who is operating it. If they have a rule of that kind and want to say that, that is something concerning their internal affairs.

* * * * *



BRIEF FOR APPELLEES

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 13,574

MORRIS JOHNSON
DOROTHY JOHNSON

Joseph W. Stewart?

CLERK

Appellants

v.

AMERICAN FEDERATION OF MUSICIANS
MUSICIANS PROTECTIVE ASSOCIATION, LOCAL
#710 MUSICIANS UNION—DISTRICT OF COLUMBIA
FEDERATION LOCAL #161

Appellees

**Appeal From the United States District Court for the
District of Columbia**

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December 17, 1956.



COUNTER-STATEMENT OF QUESTION PRESENTED

In the opinion of the appellees, the sole question is:

Whether, in a three-count suit for damages for interference with the right to make leases, for violation of the Sherman Anti-trust Act, and for personal libel, the trial court properly directed a verdict for the defendants-appellees where the plaintiffs-appellants failed to prove either liability or damages as to any of the three causes of action.

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AMERICAN FEDERATION OF MUSICIANS
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#710 MUSICIANS UNION—DISTRICT OF COLUMBIA
FEDERATION LOCAL #161

Appellees

**Appeal From the United States District Court for the
District of Columbia**

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

Appellants filed a complaint against the appellees in the District Court. This complaint asserted three separate causes of action:

1. That the appellees had unlawfully interfered with the appellants' right to make certain leases for the rental of realty owned by them. (J.A. 1-6).

2. That the appellees had imposed an unlawful boycott against appellants' realty by means of a conspiracy in violation of the Sherman Anti-trust Act. (J.A. 6-9).

3. That appellees had libeled the appellants by listing them and their property on the National Defaulters List. (J.A. 9-10).

Appellants are the owners of real estate and premises at 1423-1425 U Street, N. W., Washington, D. C., the basement portion of the premises being designed as a night club and restaurant. From time to time the appellants leased the basement portion of the premises to various individuals, most of whom operated the night club and restaurant under the name "Club Bengazi" (J.A. 2, 27).

The three causes of action were premised on the alleged inclusion of the names of the appellants and the Club Bengazi on the National Defaulters List maintained by the appellee American Federation of Musicians. That list, which appeared in the monthly magazine of the Federation, contained the names of those individuals and establishments that had defaulted in their contractual obligations with musicians belonging to the Federation. The appellees admitted (J.A. 14) that the Club Bengazi had been placed on the list for various periods, said listings arising from the undenied and still outstanding defaults of several former lessees and operators of the Club Bengazi (J.A. 88). But the appellees denied (J.A. 14), and appellants were never able to show otherwise, that the names of the individual appellants ever appeared on the list.

The appellees admitted (J.A. 13) that "when an establishment is placed on the National Defaulters List no member is permitted to contract for or perform in that establishment until it is removed from said list". As to removal from the list, the evidence introduced by appellants

at the trial showed that under Federation policy "an establishment may be removed from the National Defaulters List by good faith negotiations resulting in an arrangement for paying past indebtedness or in a showing that the present establishment is in no way responsible for the past indebtedness". (J. A. 88).

The appellants alleged under the first count that as a result of the Club Bengazi listing there was an unlawful interference with their right to lease the premises from time to time. Under the second count it was alleged that the practices and policies involved in the maintenance of the National Defaulters List violated the Sherman Anti-trust Act. And under the third count it was asserted that the listing libeled the appellants as individuals.

Following the introduction of the appellants' evidence, the appellees moved for a directed verdict in their favor. This motion was granted and judgment was entered accordingly (J.A. 31).

SUMMARY OF ARGUMENT

On this appeal from the trial court's grant of appellees' motion for a directed verdict at the close of appellants' case, the sole question before this Court is whether appellants presented any substantial evidence in support of any of the three asserted causes of action. On that basis, appellees contend that the record below is barren of any such substantial evidence and that the directed verdict was fully warranted.

As to the first cause of action—the alleged interference with existing and prospective leases—there was a complete failure of proof that the appellees either intended to interfere or did in fact interfere with any leasing negotiations of appellants. Nor was any evidence presented from which a jury could have intelligently speculated as to the alleged damages.

The second cause of action—the alleged violation of the Sherman Act—was defective both as a matter of pleading and as a matter of proof. There was no allegation or evidence that the appellee labor organizations (1) restrained commercial competition in the marketing of goods or services, or (2) combined with non-labor groups to restrain business activity within the meaning of the Sherman Act. The absence of either of those elements was fatal to the second cause of action.

The third cause of action—the alleged libel of the appellants—was equally unsupported by any competent proof. The appellants were never named by the appellees on the National Defaulters List and there was no proof that appellants were generally known as the owners of the listed Club Bengazi. There was no attempt to prove the reputation of either of the appellants or to show that they had suffered in any way as a result of the Club Bengazi listing.

The remaining points raised by appellants are not properly before this Court since they do not relate to the sufficiency of the evidence presented by appellants at the trial. And, as appellants concede, these matters “by themselves do not warrant reversal of the judgment of the District Court”. In any event, the issues sought to be presented are without merit and in no way did the respective rulings adversely affect the appellants.

ARGUMENT

1. THERE WAS NO SUBSTANTIAL EVIDENCE WARRANTING THE SUBMISSION OF THE CASE TO THE JURY.

This is an appeal from the trial court's grant of appellees' motion for a directed verdict at the close of appellants' case. It is elementary that on such an appeal the only question to be determined is whether, as a matter of law, there was any substantial evidence presented by appellants which raised an issue for, and required the

submission of the case to, the jury and which would justify a verdict for appellants. *Lumbra v. United States*, 290 U.S. 551, 553. And in viewing the evidence, the appellate court will construe it most favorably to the appellants. *Boaze v. Windridge & Handy, Inc.*, 70 App. D.C. 24, 102 F. 2d 628; *Hohenthal v. Smith*, 72 App. D.C. 343, 114 F. 2d 494.

At the same time, where as here the trial judge has had the opportunity to see and hear appellants' witnesses and consider matters not capable of record, the judge's decision on a motion for a directed verdict is entitled to weight in the appellate court and will not be lightly overturned. *Brown v. Capital Transit Co.*, 75 App. D.C. 337, 127 F. 2d 329; *Colby v. Riggs Nat. Bank*, 67 App. D.C. 259, 92 F. 2d 183. The burden is on the appellants, in other words, to overcome the presumption of correctness which adheres to the lower court's judgment and to demonstrate some prejudicial error on that court's part. *Kaplan v. Manhattan Life Ins. Co.*, 71 App. D.C. 250, 109 F. 2d 463; *McNeil v. United States*, 66 App. D.C. 199, 85 F. 2d 698; *Safeway Stores, Inc., v. Coe*, 78 App. D.C. 19, 136 F. 2d 771.

Thus the focus of this appeal is not, as appellants would have it in their brief (pp. 12-22), on the abstract legality or illegality of appellees' conduct to which appellants object. Rather the attention of this Court is necessarily confined to determining whether appellants can justifiably point to any substantial evidence submitted at the trial which would warrant the submission of their case to the jury on any one or more of the three alleged causes of action. On that basis, the appellees contend that the record below is barren of any such substantial evidence and that the directed verdict in appellees' favor was fully merited. Indeed, so completely lacking in proof was appellants' case that this entire proceeding, and particularly this appeal, borders on the frivolous.

a. The first cause of action

It was alleged in the first cause of action that the listing of the Club Bengazi on the National Defaulters List, and the Federation's policies respecting that list, constituted a knowing and intentional interference with appellants' existing and prospective leases (par. 11 of complaint, J.A. 5). Obviously, then, it was incumbent on the appellants to prove (1) an intent to interfere and (2) actual interference. See Sayre, *Inducing Breach of Contract*, 36 Harv. L. Rev. 663, 678-680. Neither element was demonstrated with any substantial evidence by the appellants.

As to the element of intent, there was a complete failure of proof that any of the appellees, through their officers, ever knew of any lease negotiations between the appellants and their prospective lessees, much less that they intended to interfere with or frustrate such negotiations. The most that the record contains is hearsay testimony that the brother-in-law of one prospective lessee (Lorenzo Middleton) made some sort of telephone inquiry of an unspecified employee of the Federation and was apparently informed by a letter, that was not produced and whose alleged author was not identified, that the Club Bengazi's listing could be removed if provision were made for paying off back indebtednesses (J.A. 66-70). But such dubious testimony is no substitute for proof that the appellees knew of the negotiations between appellants and Middleton and knowingly and intentionally sought to interfere therewith.¹

¹ Appellant Morris Johnson apparently addressed an inquiry to the Federation just prior to the institution of this suit stating that he was interested in operating the Club Bengazi and inquiring what arrangements could be made for paying off past indebtednesses. The Federation's response (Ex. 16, set forth at pp. 4-5 of appellants' brief) does not indicate, however, that the Federation was apprised of Johnson's ownership of the club or of his alleged desire to enter into lease arrangements with other individuals. No claim was ever made in the case that the appellees interfered in any way with Johnson's operation of the club. This letter, moreover, cannot be said to support appellants' claim, made in the brief (p. 4) for the first time, that the Federation "attempted to collect Paul Mann's debt from the appellants".

Nor was the evidence of actual interference any more substantial or trustworthy. One lessee, Louis E. Murray, gave uncontradicted testimony that the Federation never did anything to interfere with his lease with appellants (J.A. 88). It was stipulated that one prospective lessee, one James R. Cowan, did not enter into a lease with the appellants not only because the Club Bengazi was on the defaulters list but because he did not have the requisite funds to operate the Club (J.A. 89). One other prospective lessee, Lorenzo Middleton, testified that one reason he did not pursue his lease negotiations with appellants was his alleged understanding that past indebtedness incurred at the Club Bengazi would have to be paid off before musicians could be obtained for entertainment (J.A. 76). But the uncontradicted testimony also showed that Middleton was economically insolvent at the time of these negotiations and was not financially able to enter into a lease (J.A. 71-74).²

Thus there was no evidence whatever that but for the policies and activities of the appellees the negotiations engaged in by the appellants would have culminated in leases. See *Lewis v. Bloede*, 202 F. 7 (C.A. 4); *Bailey v. Hans Watts Realty Co.*, 113 W.Va. 739, 169 S.E. 404. The mere listing of the Club Bengazi—and nothing more than the listing was ever shown—did not constitute the actual or sole reason for the breakdown of any lease negotiations. And in the absence of proof of any knowledge or intention on the appellees' part to cause the listing to result in the interference with any negotiation, the first cause of action was devoid of all necessary evidence.

To the foregoing absence of requisite proof must be added the total omission of competent proof as to the

² Appellants make the assertion in their brief (p. 5) that Ralph Feldman, an alleged potential lessee, failed to execute a lease when informed of the listing of the Club Bengazi. The record reference given (J. A. 61) fails to support any such assertion and no evidence to that effect was ever produced in fact.

value of the leasehold interest at issue and the consequent damages of any alleged interference by the appellees. There was no basis whatever in the record for the jury to speculate intelligently as to damages.

b. The second cause of action

The second cause of action alleged that the acts of the appellees constituted "a combination and conspiracy in restraint of trade and commerce in the entertainment field among the several states, the monopolizing of a part of such trade and commerce, an attempt to monopolize a part of such trade and commerce, and a combination and a conspiracy to monopolize the same" (J.A. 7), all in violation of Sections 1 and 2 of the Sherman Anti-trust Act.

On its face, such a charge against labor organizations like the appellees fails to state a cause of action under the Sherman Act. And that failure was compounded by a total lack of competent proof at the trial, making it appropriate to direct a verdict in appellees' favor on this second count. The two vital elements that were absent both in the pleadings and the proof were:

(1) Restraint by the appellee unions of commercial competition in the marketing of goods or services. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 473; *Gundersheimer's, Inc. v. Bakery & Confectionery Workers Union*, 73 App. D.C. 352, 119 F. 2d 205. Here it is obvious from the pleadings and conceded facts that the appellee unions are not engaged in and hence cannot restrain any business of a commercial nature. They are not engaged in providing or selling commercial entertainment. Cf. *United States v. Shubert*, 348 U.S. 222. They are merely voluntary groups of professional musicians who individually contract for their services (J.A. 13-14) and any combination they may effectuate to withhold their services from establishments on the National Defaulters List is not a violation of the Sherman Act. "They can sell or not sell their labor as

they choose, without infringing the Anti-trust laws." *Hunt v. Crumboch*, 325 U.S. 821, 824.

(2) The combination of appellee unions with non-labor groups to restrain business activity within the meaning of the Sherman Act. Even if the appellees were engaged in business activity designed to restrain commercial competition in the marketing of goods or services, the second count was fatally defective in its allegations and proof in failing to demonstrate that the appellee unions have combined with non-labor groups to violate the Act. Labor unions are subject to the Act only to the extent that they join with employers or employer groups to restrain trade. As the Supreme Court has said, "The same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 810. And hence a labor union acting alone may escape the impact of the Act even if those activities, if pursued by a business organization, would constitute a violation of the Act. *Hunt v. Crumboch*, 325 U.S. 821, 825. "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *United States v. Hutcheson*, 312 U.S. 219, 232.

The argument of the appellants in their brief (pp. 14-20) that the applicability of the Sherman Act rests on the legality of the appellees' activities under the Norris-LaGuardia Act is patently erroneous. Aside from the fact that those activities were legitimate trade union functions, *Miami Federation of Musicians v. Wompearce, Inc.*, 76 So. 2d 298 (Fla.), the Sherman Act can apply only if both of the aforementioned elements are present. In their absence, no liability can attach to a labor group however legitimate or illegitimate its activities may otherwise be.

c. The third cause of action

No serious effort was made to prove the third count of the complaint that the appellees contrived and intended to libel the appellants through listing them and the Club Bengazi on the National Defaulters List (J.A. 10). Appellees' denial that the appellants had ever been named on that list (J.A. 16) was never challenged. And no attempt was made to show that the listing of the Club Bengazi in any way reflected upon the appellants or that they were generally known to be the owners of that club. One of the appellants, Dorothy Johnson, was not called as a witness and gave no testimony to support her claim that she had been libeled. The other appellant, Morris Johnson, did testify but said nothing whatever about his reputation or about any scandal, ridicule, or disrepute he had suffered as a result of the Club Bengazi listing. And no other witness testified as to anything even remotely related to the alleged libel. Such a complete failure of proof more than justified the directed verdict as to the third cause of action.

2. THE OTHER ISSUES RAISED BY APPELLANTS ARE NOT PROPERLY BEFORE THIS COURT.

Appellants seek to raise a host of trivial issues in their brief (pp. 23-31) which do not merit the consideration of this Court since they are not properly before it. As appellants themselves are forced to admit (brief, p. 11), these matters "by themselves do not warrant reversal of the judgment of the District Court". More importantly, they go beyond the scope of the issue presented by the directed verdict below and do not involve any degree of prejudice or injury to appellants in the present posture of the case. Briefly, these irrelevant contentions are:

(A) That appellees' counsel engaged in deliberate misconduct. The nine instances complained of (brief, pp. 23-24) are too trivial to warrant response. None of them involved any misconduct in any meaningful sense of that

term. Moreover, any alleged misconduct has importance only in relation to any improper influence or prejudice, to appellants' detriment, that might have been created in the jury's mind. See *Simpson v. Stein*, 52 App. D.C. 137, 284 F. 731. Here, of course, the case never reached the jury and thus appellants could not have been hurt by any alleged misconduct.

(B) That the trial court misconceived appellants' case, which resulted in prejudicial and restrictive rulings. Here again the objections raised are trivial in the extreme. The discretion exercised by the court below in requiring appellants' counsel to put one of the appellants on as the first witness is not a reviewable action in the absence of some injury to appellants more substantial than confusion in their counsel's mind. *Davis v. Fredericks*, 105 U.S. 4. And the contentions that the appellees' opening statement precluded their right to move for a directed verdict and that the denial of their prior motion for summary judgment was res judicata as to whether a prima facie case had been stated and proved as to the second and third counts have only the merit of answering themselves.

The assertion that the court erred in refusing to permit appellant Morris Johnson to testify concerning the execution of certain leases is baseless. The only question in this respect which appellants' counsel was not allowed to ask and as to which an exception was taken was:

"Q. Mr. Johnson, would you please tell the Court and jury the circumstances of the negotiating of this lease?" J.A. 41.

Since the particular lease referred to was executed and was already in evidence, the lease spoke for itself and the court properly sustained the objection to it. Moreover, the lessee involved—Louis E. Murray—was later called as a witness and gave uncontradicted and unchallenged testimony that during the negotiating of this lease the fact of the listing of the Club Bengazi was not known to him

and was not discussed with the appellant. Any question as to appellants' ability to prove the "res gestae" as to this lease thus evaporated through the simple expedient of calling the proper party and avoiding hearsay testimony, as the trial court pointed out.

(C) The objection to the pre-trial order requiring appellants to produce their income and property tax returns cannot be heard at this juncture of the case since the directed verdict made it unnecessary for appellees to seek to use those returns in any way. Thus appellants have in no sense been prejudiced or injured by the interlocutory order to produce the returns and an appeal therefrom will not lie. See 13 Cyclopedia of Federal Procedure (3rd ed.), Sec. 57.46, p. 149.

(D) The contention that the pre-trial judge erred in granting appellees leave to amend their answer to include additional defenses of limitations and laches is also outside the bounds of this appeal. The directed verdict made it unnecessary for appellees to seek to utilize these additional defenses and appellants were thus in no way injured by the order allowing the amendment. Clearly, an appeal will not lie from such an order which has not culminated in a ruling prejudicial to appellants. *Pioneer Grain Corp. v. Chicago, M. & St. P. R. Co.*, 42 F. 2d 1009 (C.A. 8).

CONCLUSION

Appellants' complete failure to prove any of the essential allegations of the complaint and the speciousness of the objections raised as to the conduct of the trial justify an affirmance of the judgment below.

Such affirmance should be forthcoming without any leave granted to appellants to amend their complaint to allege a belated fourth cause of action, as requested in their brief (p. 31). No reason is suggested by appellants why at this late date they should be accorded a chance to inject a new element into a hopeless case. The fact that appellants'

counsel has only recently discovered a 19-year old decision of this Court and a more recent Ohio decision, rendered prior to the pre-trial proceedings in this case, constitutes no adequate excuse.

Finally, any affirmance of the judgment below should be accompanied by an award of appeal costs to the appellees. Rule 20(b) of this Court's rules plainly provides for such an award and no basis is suggested by appellants (brief, p. 31) for ordering otherwise.

Respectfully submitted,

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